

No. 864

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE NINTH CIRCUIT.

THE BOISE CITY ARTESIAN HOT
AND COLD WATER COMPANY,
LIMITED,

Plaintiff in Error,

vs.

BOISE CITY, IDAHO,

Defendant in Error.

TRANSCRIPT OF RECORD.

Upon Writ of Error to the United States Circuit
Court for the District of Idaho, Central Division.

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*In the Circuit Court of the United States, Central Division,
for the District of Idaho.*

BOISE ARTESIAN HOT AND COLD
WATER COMPANY, Limited,

Plaintiff,

vs.

BOISE CITY.

Defendant.

Complaint.

Plaintiff, a corporation of the State of West Virginia, brings this action against Boise City, a municipal corporation of the State of Idaho, and, complaining, alleges:

I.

That now and at all times since September 1st, 1900, plaintiff is and has been a private corporation organized and existing under and by virtue of the laws of the State of West Virginia, and acting as such, and as such is doing business in the State of Idaho, with its principal office and place of business in the city of Boise City, Ada County, Idaho, and has complied with the laws of Idaho obligatory on foreign corporations doing business in Idaho.

II.

That defendant is and during all times herein mentioned has been a municipal corporation, a city of Idaho, situate in said Ada County.

III.

That the amount involved in this controversy and to recover which this action is brought exceeds the sum of five thousand dollars, exclusive of interest and costs.

IV.

That during all times herein mentioned, since March 28th, 1891, and prior to August 28th, 1901, there existed that certain private corporation; acting and doing business as such, and so known and recognized, named, known as, and called the Artesian Hot and Cold Water Company, Limited, and which will also be hereinafter often referred to and called (for convenience) "the Idaho Company," and which was organized and existed under and by virtue of the general laws of Idaho relating to private corporations, and had its principal office and place of business at said Boise City, and which was the predecessor in interest in the waterworks, rights and properties hereinafter mentioned, and in the ownership and operation of the same.

V.

That during all the times herein mentioned, subsequent to March 28th, 1891, and down to the 28th day of August, 1901, said Idaho Company was the owner of waterworks and waters of great value, such waters having been discovered, located, developed and supplied by said company and its predecessors in interest at great trouble, labor and expense and by sinking shafts, running tunnels, digging and boring wells into the mountain land owned by said company and its said predecessors; none of its waters having been acquired, claimed out of, or appropriated from any pond, lake, stream or natural

source or natural supply, or from any of the public waters of the said State; that its business was, among other things, the operation of a cold and of a hot water plant in Ada County, Idaho, in, and in the vicinity of, the city of Boise City. It owned and operated with and on its own properties its own waters only, all situate upon its own lands except certain underground pipes and their connections which ran through other lands over which it had easement, right of way and franchise. Its waters were expensive having been developed, supplied and maintained at great cost. The founders, creators, original owners and first operators of the said water plant and waterworks, the predecessors in interest in same of said Idaho Company, were H. B. Eastman and B. M. Eastman. Said Eastmans, as soon as they had discovered, developed and collected of said waters quantities nearly sufficient to supply water for domestic use to the inhabitants of said city and its vicinity, applied for and obtained by grant on the third day of October, 1889, a franchise from said defendant city in words and figures as follows, to wit:

“AN ORDINANCE GRANTING EASTMAN BROTHERS THE RIGHT TO LAY WATER PIPES IN BOISE CITY.

The Mayor and Common Council of Boise City, Idaho,
Ordain:

Section 1. H. B. Eastman and B. M. Eastman and their successors in interest in their waterworks, for the supply of mountain water to the residents of Boise City, are hereby authorized to lay and repair their water pipes in, through and along and across the streets and alleys

of Boise City, under the surface thereof; but they shall, at all times, restore and leave all streets and alleys in, through, along and across which they may lay such pipes, in as good condition as they shall find the same, and shall at all times, promptly repair all damage done by them or their pipes, or by water escaping therefrom.

Section 2. This ordinance shall take effect from and after its passage and approval.

Approved October 3, 1889."

VI.

That the said Eastmans promptly accepted said grant and franchise and immediately thereafter continued to lay water pipes in the streets of said city and to extend the same from time to time as they increased their said water supply and as the demand therefor by the citizens of said city increased, and to charge, collect and receive reasonable water rates from all persons who demanded and received water from them, the said Eastmans; and they at all times did and performed all things obligatory upon them under and by reason of said franchise, or of their acceptance of the same, or of the operation of said waterworks, or which were obligatory on account of any matter or thing connected with the operation of said waterworks, or the acceptance of said franchise.

VII.

That in June, 1890, the said Eastmans and others formed a corporate company known as the Boise Waterworks Company, a corporation formed and organized under the general laws of Idaho as a private corporation, which afterwards became and was the successor

in interest of the said Eastmans in and to their said waterworks; and in said grant and franchise from said city, and it assumed as such successor all the duties and liabilities, and none other, appertaining to said waterworks, and to said franchise in the hands of said Eastmans, and was by all persons recognized as such successor with such duties and liabilities.

VIII.

That afterwards and on the 28th day of March, 1891, the said Artesian Hot and Cold Water Company, Limited (herein also designated as the "Idaho Company"), was formed and organized, and it became and was the successor of the said Boise Waterworks Company and of the said Eastmans in and to said waterworks and the said grant and franchise made to said Eastmans by said city, and was so known and recognized by all persons, and acted as such down to August 28th, 1901, and it also in like manner, and with like limitation, assumed all the duties and liabilities pertaining to said waterworks and said grant and franchise which were assumed by or were obligatory upon the said Eastmans, and it owned all said properties, rights, franchises and privileges and operated the same as such successor down to August 28th, 1901, and during all these times did and performed all it was obligated to do by virtue of such operation, ownership and successorship.

IX.

That the said Eastmans and others prospected by deep boring into the rocks of the mountains upon their own lands for both hot and cold waters and discovered the same at an average depth of about 400 feet, and sold

the same with the lands upon which they were situate to said Idaho Company, and said Idaho Company employed and used the same in supplying both hot and cold artesian waters to the citizens of Ada County both in and in the vicinity of said city for reasonable compensation. Said waters were used for various beneficial purposes, including use for baths and bath-houses, public and private, for mechanical, sanitary, hospital and domestic purposes, and to secure such waters said Idaho Company and its predecessors have bored nineteen such wells, aforesaid, have run tunnels into the mountains, and thus, at great expense, discovered and developed on their own lands all of the waters used in said waterworks, have constructed and maintained both hot and cold water systems; that the supply of hot water is very limited (and for more than a year last past has been all applied for and rented to patrons), and, after great and expensive efforts to obtain more, seems incapable of being increased; that the supply of cold water for said system is limited and can only be increased by extra efforts and expense including the necessity of expensive pumping when more is required than is needed for the domestic and ordinary use of the usual paying patrons of said waterworks; that the waters of said waterworks are expensive, costing great outlay of money to develop and maintain the same, and greater labor and expense each day to increase the amount of cold water whenever the same is used for street sprinkling, and every gallon of water used for street sprinkling is that much beyond the means and supply of said waterworks and entails the extra cost, expense and labor of producing that amount by pumping, raising it to the height or

pressure of 178 feet above said city; that for supplying water equal to the demand of patrons for domestic use, and for all ordinary uses other than sprinkling of streets, except in case of fire, requires only a small pumping plant, and that to be used only about four hours each day; that to supply sufficient water for such use of its said patrons, when said city is taking waters as herein-after set forth, requires much extra labor and expense and necessitates a larger pumping plant, the digging of extra wells, and almost constant pumping, and is beyond the water supply, the resources of the plant and the means of the owners and operators of said waterworks.

X.

That the said Idaho Company, from the said date of its formation down to August 28, 1901, was a private corporation, organized and existing under and by virtue of the general law and statute of Idaho as such, and so known, recognized, and dealt with by all persons at all times, and had its principal place of business at said Boise City; that it was, and was recognized as, the successor in interest of said Boise Waterworks Company and of said Eastmans, and so dealt, was dealt with, and acted during all said times down to August 28th, 1901, in and to the said waterworks and the rights, franchises and privileges, and in all that pertained to the said waterworks, and that also belonged to said Eastmans as owners of, as grantors of, and as operators of, the same under said rights and privileges in hands of said Eastmans, and as nothing different, farther, or otherwise; and said Idaho Company, during all said times, assumed and performed all the like duties obligatory upon said Eastmans when and as such owners and opera-

tors, and all that would have been obligatory upon said Eastmans during any of said times had they continued to own and operate said waterworks and properties at all times or ever; and during all said times it was by defendant and all persons so known, recognized, dealt with and acknowledged as such successor, owner and operator aforesaid, and not otherwise.

XI.

That the ordinary and necessary demand for water from said waterworks required, at no time during last five years, any pumping except by one pump, and for the space of not to exceed over four hours each day, and for most of that time no pumping was required at all for ordinary uses, while to supply the water for such ordinary and necessary use, during these times, of the customers of said company, and at the same time to furnish waters used for street sprinkling by the defendant as hereinafter set forth, did at all times during the sprinkling seasons for the years 1900 and 1901, require the whole capacity of a large pumping plant of two large pumps run nearly every hour, by day and by night, and this pumping, and such extra pumping said Idaho Company was compelled to do by the wrongful acts of defendant, hereinafter set forth, and did so do during such said seasons.

XII.

That said Idaho Company had continually, since its formation, dealings with said Boise City, with Ada County, and with the State of Idaho, and as such corporation and as such successor of said Eastmans in interest in said waterworks, franchise, privileges and

rights; that at nearly all times since its existence furnished water to said city and inhabitants thereof, for fire purposes, for sprinkling of its streets, for heating of buildings and for other useful purposes, for reasonable compensation and at agreed rates as to all uses until the sprinkling season of 1900, when defendant refused to enter into any contract for water for fire purposes or for street sprinkling purposes, or for any other purposes which it denominated "great necessities"; that prior to 1897 what water taken from said waterworks was used in said city for street sprinkling, was obtained from said company directly by the owners or lessees of abutting property on streets sprinkled, and by contract at reasonable agreed rates; that in 1897 the said city assumed to and did instead and in place of said abutting owners or lessees, and on its own account, contract for and with said company, and obtain from said company, water for street sprinkling purposes, for which water it agreed to pay and did pay a reasonable agreed price; that thereupon, in order to facilitate the taking and use of its waters for street sprinkling purposes, said Idaho Company, by and to carry out its contracts with said city, and under promises of patronage from said city, erected and maintained at its own expense stand-pipes in all parts of said city, whereby contracts and by requests of said city, it was obligated or directed so to do, and did this for such purposes only, and under and on account of said contract for such supplying of its waters when and where requested by said city, the city by contracts agreeing to purchase waters of the company for such purpose; and said Idaho Company, by request of said city, and for its convenience in taking its waters for

such sprinkling purposes, did thereupon so erect eighteen in number of such stand-pipes at a cost of over threehundred dollars, and maintained the same as by said agreement it was obligated to do; and in order to have sufficient supply of water for its other uses and the uses of its customers, together with what under contract with defendant would be used for street sprinkling, and in accordance with the terms and conditions of said contract, and to carry out the same on its part, the said company did, as it had in said contract with defendant agreed to do, within ninety days from and after the execution of said contract, lay a ten-inch main pipe from its pumping station to said city, and that except for supplying said city with water, as by said contract was contemplated and provided for, the six-inch main which then extended from said waterworks, reservoirs and plant to said city was sufficient and adequate for all purposes and uses of said company and its patrons.

XIII.

For the year 1898, a like contract was made and entered into between said city and said Idaho Company, whereby said company was to erect and maintain at its own expense, stand-pipes for the convenient taking and use of its said waters when and where requested so to do by said city, and the said city was to have of its said waters water for street sprinkling purposes at certain agreed rates per front foot of properties abutting on streets sprinkled, the same being in proportion to amounts of water taken and used on various streets respectively, the said city to pay for same at such rates, which it did accordingly; and the said company did all

it was required to do, or was obligated to do, under said contract, or otherwise; that for the year 1899 the said Idaho Company and the said city made and entered into a like contract for water for street sprinkling to those theretofore made as aforesaid, and each party thereto carried out what it was required to do under said contract, except that the said city has not as yet fully paid the moneys due the company thereunder. In each and all of said contracts the said parties thereto distinguished between the taking and using of waters for street intersections and alley crossings and those used on portions of streets before lots abutting thereon, and in which later case the cost thereof was assessed with other costs of sprinkling same to owners of such lots, and was by the city collected from such owners, and paid over to the said company.

XIV.

That during the existence of said Idaho Company prior to 1900 it had, as such water company, and as such successor in the interest, ownership and operation of said waterworks, rights and properties and all belonging or appertaining thereto, at all times and continually dealing with said city and as such water company, with such rights, privileges, and properties, entered into contracts of various kinds with said city concerning the use of its waters and the supplying the same, including contracts for furnishing water for fire purposes and for street sprinkling purposes, and all these contracts were, prior to 1900, faithfully carried out by both parties thereto, and the performance and execution were in every way acceptable to and approved by said city, and were

reasonable, fair and legal; and in preparing to carry out what was agreed to in, and contemplated by, said contracts, for water for fire and street sprinkling purposes, it, as was then and there well understood, agreed and promised by and between the said parties thereto, became and was necessary, and the said company was obliged to, obligated to, and did go to great extra cost, labor and expense in the increasing of its water pressure by the maintaining of an extra reservoir, in the erection of stand-pipes, in the increasing of its pumping plant, in the purchasing of a steam boiler, engine and pump, and in various other actual and necessary expenses for such contractual purposes, in all to the extra cost and expense of over twenty thousand dollars, over and above what would have been and is required or necessary for supplying water to the patrons of said waterworks for all other purposes than street sprinkling, and such said extra expense was incurred in pursuance of contracts with defendant, and in reasonable expectation of, and promise of reasonable compensation for such continuing uses of its said waters in the future, and not otherwise; that always, prior to 1900, the company's right to compensation for water used for street sprinkling was conceded, acquiesced in, and respected by the defendant and by all persons; and defendant contracted thereabout, assessing the cost of same to owners of abutting property on streets sprinkled, and collecting the same both by legal proceedings in the courts and otherwise.

XV.

That the said Idaho Company at great expense improved said system of waterworks and largely increased

its water supply; it invested in said waterworks system and property used in connection therewith, a sum equal to three hundred and forty thousand dollars (\$340,000), a large portion of which was made necessary to enable said company to furnish the said city with water for municipal purposes, particularly for sprinkling the streets, and extinguishment of fires, and said company was, especially during the last two years, put to great additional expense in the daily operation of its said waterworks system on account of the great quantities of water taken and used by said city for street sprinkling; such additional expense was in about the sum of \$900.00 per month over and above what would have been otherwise required.

XVI.

That the said Idaho Company had a several and separate contract with said city for each of the years 1896, 1897, 1898, and 1899, by which the company was obligated to furnish the city water for such municipal purposes and by which the city agreed to pay to the said water company therefor a fixed and stipulated compensation; and that the extra outlays and expenses herein mentioned, as over and above what would otherwise have been necessary, were made in pursuance of such said contracts with said city, and in expectation of compensation from the city for such uses of water by the city.

XVII.

That in or about the month of March, 1900, the said city having declined to pay or agree to pay the said water company anything for the use of water for municipal purposes, did, without the request or knowledge of the said water company, undertake and assume to

pass an ordinance purporting to grant to the said water company the right to lay pipes in the streets and alleys in said city, and to collect charges for water supplied to the inhabitants thereof, but requiring the water company to furnish water for city purposes free of charge; the said water company not only never requested the passage of this ordinance, but has never assented thereto, or accepted it, or ever recognized in any manner the validity or binding effect thereof; and thereupon, after the passage of said ordinance, the said city at once proceeded to, against the orders of said company, without its consent, and by force, take water of the said Idaho Company, from its waterpipes, and to use it for street sprinkling, and to sprinkle about thirty miles of streets with said company's water, taken without permission, against the protests of said company, and by force, from said company's pipes, and to do the same under claim of right to free water; and under and by virtue of said ordinance the police of said city protected and enforced the taking of said waters aforesaid, and the meddling with the waters, the pipes, and the property of said company; and the said city continued so to take water continually, and continually against the protests and objections of said company, from and after the passage of said ordinance in March, 1900, down to August 28th, 1901, and to use the same for sprinkling its streets, and by force, and declaring it would pay nothing therefor, and on the ground that said company was not entitled to any compensation therefor; and said city assumed the control and direction of the sprinkling in front of all properties of all owners, and prevented owners of abutting property from contracting for or paying for the

water used in sprinkling in front of their respective properties, and, by its police and police power, said city enforced said ordinance demanding said waters free for street sprinkling, and as aforesaid, by force, took the same, proclaiming that it would give no compensation therefor.

XVIII.

That for sprinkling streets at all times since March, 1900, and prior to August 28th, 1901, the said city took each day from the said waterworks system of said Idaho Company water to the amount of over two hundred and fifty thousand gallons; and to furnish said water into its pipe lines, whence it was so taken, cost the said Idaho Company over fifty-five dollars each day of such taking, and thirty-nine dollars per day over and above what the company's daily expense would otherwise have been, and that said water was reasonably worth then and there twelve and one-half cents per thousand gallons, and was worth that much to the said city, and the taking of the same in manner aforesaid, by force and without consent, did the said Idaho Company a damage of over fifty-five dollars each day during all of such times between such dates on days when water was so taken for such sprinkling of streets, and the days between such dates when water was so taken were in number greater than four hundred.

XIX.

That said city is situate immediately upon a large, ever-flowing river, is traversed by three large, ever-flowing water ditches, each and all containing an abundance of water, and is built upon lands but little above the water line, so that shallow wells from eight to fifteen

feet deep, sunk anywhere in said city, furnish an abundant supply of water, and that all these waters were and are in abundance in, around, and under said city, and furnish and furnished to all parts of said city a cheap, convenient, and inexhaustible supply of water, costing little or nothing except the effort of dipping it up, or in some way raising it a few feet. Such cheap water was and is as good as any for street sprinkling, but not so cold, pure, healthful, and desirable for drinking, bathing, and culinary purposes as are and were the expensive waters of said waterworks then owned and operated by said Idaho Company; that instead of using such cheap waters, the said city at all times since March, 1900, has taken the position, has given notice and declared that the waters taken and used by it for street sprinkling on any and all of its streets, or any portion of any street, need not be paid for, either by it or by the owners of abutting properties, or by anyone or at all, provided that the same be taken from said waterworks.

XX.

That said Idaho Company never enjoyed any special or exclusive rights, privileges or franchise of any kind; that at all times any person, partnership, association or corporation might have laid pipes in the streets and alleys of said city and sold water to said city and the inhabitants thereof, and in all respects do and enjoy all that said Idaho Company did or could have done; and that at all said times, and now, one person, Mr. Peter Sonna, had and has a system of waterworks which supplied and supplies a considerable portion of said city, and the inhabitants thereof with water, for compensa-

tion at rates fixed by contracts between Mr. Sonna and his water customers, said consumers of water from his waterworks, he, during these times supplying water for domestic uses, lawn sprinkling and mechanical purposes, all within said city, and where said Idaho Company had mains and waterpipes, and where it could as easily have furnished water as it did in any other portion of the said city, and said Mr. Sonna did not furnish free water to said city for street sprinkling or fire, or for any purpose, or at all, and said city did not require or demand free water from his system of waterworks, nor did it take the same; and during all these times since 1899, said Sonna thus furnished water for such compensation to eight blocks of said city, and to the inhabitants thereof, and might have and had the right to have furnished any number of the blocks of and the inhabitants of said city with water, all under the same kind of powers and privileges, and like grant and franchise, as was granted and accepted by said Eastmans and said Idaho Company; and said Sonna had and has the same pure, cold mountain water with which he did and can supply his customers from said waterworks system as had said Idaho Company and its said predecessors: And that others enjoy, and during said last four years have enjoyed, like grants, rights and privileges from said city, and have customers of said city and of its inhabitants in the purchase and use of water, and each and all said parties were and are competitors with the owners of said system of waterworks, then owned by said Idaho Company, in said business of furnishing water to said city and its inhabitants; and that from none of said such competitors was free water demanded or taken by said city on the ground tak-

en by said city that a firm, a natural person, or an association of persons need not furnish water free of charge, for street sprinkling, or for any purpose, while it or they enjoy all the rights and privileges ever enjoyed by said Idaho Company or its predecessors, while said city did require free water from said Idaho Company and, during all times since March, 1900, did by force take water, as aforesaid, proclaiming that no compensation need be or would be given for same, and that it was because said Idaho Company was a corporation. And that the date of the ordinance of said city granting to said Mr. Peter Sonna said franchise was May 25th, 1894; and that at all times since that date said Sonna has had such rights and privileges, and had same renewed and confirmed by two subsequent ordinances of said city; and that in 1892, one A. D. Foot, was by said city granted similar rights of laying waterpipes and operating a water system in said city, and said city passed an ordinance and resolution in 1892, granting to any and all persons same and like rights and privileges of pipe laying and waterworks in said city; and that in 1900 said city by ordinance granted to one Charles Fifer the like right to lay pipes and operate waterworks in said city for purpose of furnishing said city and the inhabitants thereof water for compensation, and to enjoy all the rights and privileges enjoyed by said Idaho Company or by any of its predecessors or successors, and from none of said parties, and from no other party or person has free water for street sprinkling been by said city demanded, required or taken.

XXI.

That there were in said city a large number of stand-pipes, which were the exclusive property of the said Idaho Company, and which the said company erected and connected with its mains for the purpose of selling water for street sprinkling, and for years were, under contracts with the said city, so used. Said stand-pipes were erected by the said company under contract with and by request of said city, and in same contract, said city for each of the three successive years, and down to 1900, agreed to pay for the water used for sprinkling the streets for that year, and for such purposes and objects did said Idaho Company erect and maintain said stand-pipes, some of which were connected with its hot water pipes, and the rest with its cold water pipes; and under contracts to furnish extra water, extra reservoir and extra pressure for use of water for fire purposes by said city, said Idaho Company had, prior to 1900, connected its water mains with sixty large fire hydrants in said city, and did the same under contracts for, and in expectation of, being paid for use of its waters for fire purposes and was so paid by said city at all times down to March, 1900, when said ordinance for free water was passed; that immediately after the passage of said ordinance, the defendant, by its officers, agents, and servants, forcibly took possession of and used said stand-pipes and took said company's waters from and through same, and sprinkled same upon its streets; and said city attached standpipes to many of said fire hydrants, and from and through them also took said waters and used same for sprinkling on its streets, and all this it did and continued to do, wrongfully, illegally and by force, from

and after the passage of said ordinance down to August 28th, 1901, to the damage and injury of said Idaho Company in the sum of over \$11,000.00; and that of the waters, so taken from said company by said city during said time, and of the damages so sustained by said Idaho Company on account of such said taking, a large portion and part, to wit, one-fourth of the same, was on account of sprinkling for and in blocks and parts of said city which were supplied by water from the waterworks of said Peter Sonna, and where the inhabitants did not obtain water from said Idaho Company.

XXII.

That there was no great necessity or any necessity upon said city for taking said Idaho Company's water during said times for street sprinkling, and in so wrongfully taking it the said city elected to use and consume the expensive waters belonging to said company rather than to rightly take the cheap water running around, through and under said city in abundance.

XXIII.

That said city during said years of 1900 and 1901 down to August 28th, 1901, not only thus wrongfully took said Idaho Company's waters from said stand-pipes and said fire hydrants within said city, but also took from said company's stand-pipe and waterworks without said city, and drew the same within said city and used the same to sprinkle its said streets.

XXIV.

That in no way could said Idaho Company prevent or stop defendant from thus taking its said waters without

shutting off all and every supply of water from its customers within and without said city, interfering with and absolutely preventing its own use of said waters, and endangering all the property of said city, and other properties, by fire, and also endangering the lives and health of the inhabitants of said city and its vicinity.

XXV.

That it is not and never has been the usage, custom, habit, condition, state or public policy of the State of Idaho, or any portion thereof, must, did, or were obligated or expected to, furnish water for any purpose to any other person, city or town without compensation; and that this has never been done by any person or for any person or city, under claim of right in Idaho, and in no manner except as a gift entirely voluntary on the part of the donor; that said Idaho Company was unable to go to the cost, expense and labor of furnishing free water to said city, or to furnish free of charge the waters required by said city, taken during such times aforesaid, for street sprinkling purposes; and that such demand was beyond its means as such water company or otherwise; that said waterworks and business were, at all times since their first existence, most economically managed and operated; that said Idaho Company never had any salaried officer except its secretary, that no officer or member of the said company ever had its waters at any cheaper rates than the other customers of the company, that for years its president has devoted much time and valuable personal services to the necessary business of the company, and, since its existence, the manager of said company has every year devoted

very much of his time and labor to its management, and some years time and labor were thus taken up, yet neither the president or the manager of the said company have ever had any salary or other remuneration for services rendered the company, and notwithstanding such and in every way the most economical management the said Idaho Company's stockholders received only fifteen per cent in dividends on their investments during and for all the years of its existence; that the cold water system of said waterworks has been, and must be, under the circumstances, run not only without profit, but at a loss to its owners and operators whenever water is taken from it for such street sprinkling purposes without remuneration.

XXVI.

That the waters thus taken by said city for sprinkling of streets was so taken daily at all times when sprinkling was desired, from March 1st, 1900, down to August 28, 1901, and for not less than four hundred days between said dates, and that it was unnecessarily taken, wrongfully taken, and in so taking them the defendant elected to use and consume expensive waters belonging to said company, rather than the cheap waters running around, through and under said city as aforesaid, and that said defendant has not paid or caused to be paid anything therefor, and proclaims that it never will give any compensation therefor.

XXVII.

That in the year 1900 said city so took of and from said Idaho Company's waterworks water for such street sprinkling to the amount of 49,370,000 gallons of which

9,874,000 gallons were hot water out of its said hot water system, and 39,496,000 were cold water out of its said cold water system; and that said water was then and there of the value and worth of twelve and one-half cents per one thousand gallons, and the value and worth of said hot water, so taken by said city from said Idaho Company's said hot water system, in the year 1900, was then and there of the worth and value of \$1,234.27; and that the worth and value of the cold water, so taken in 1900 by said city from said Idaho Company's cold water system, was then and there of the worth and value of \$4,936.98. That during the sprinkling season of 1901 and down to August 28th, 1901, said city continued to take said water as aforesaid from said Idaho Company's waterworks, and the water so taken by defendant amounted to 33,120,000 gallons of the value and worth of twelve and one-half cents per one thousand gallons, and that of said water, so taken in 1901, 6,624,000 gallons were hot water out of the said company's hot water system, and 26,496,000 gallons were cold water, so taken out of said company's said cold water system. That said hot water taken in 1901 was of the value and worth of \$828.00 and that the said cold water, taken in 1901 as aforesaid, was then and there of the value and worth of \$3,312.00, all of which the said city was then and there informed of and well knew; and that by the so taking said waters said company was then thereby damaged in a sum or amount of money greater than the said values of waters so taken during said years and damaged in the sum of \$10,500.00, no part of which has ever been paid or satisfied, nor has

any compensation been had therefore or on account thereof.

XXVIII.

That the water so taken by said city during the years 1900 and 1901 from said Idaho Company's waterworks was in part taken for and used for the benefit of said city in sprinkling the intersections of its streets and alley crossings, but most largely for the benefit of such certain persons as were owners of lots abutting on streets sprinkled and for the purpose and effect of saving such said owners a portion of the cost and expense of such sprinkling, and had the effect of taking the water and property of said Idaho Company and giving it to other persons free of charge; and that the amount so taken for benefit of such said owners of abutting property was of great value, to wit, of the value of \$7,500.00 and to the damage of the said Idaho Company to the amount of \$7,500.00. That in the tampering and meddling with said company's pipes and the said fire hydrants as aforesaid, and in the taking of waters as aforesaid, for street sprinkling during the years 1900 and 1901 by the said city, the same was done so unskillfully and negligently and improperly as to at times cause great waste of water and unnecessary waste of water, so that large quantities were allowed to run and did run to no benefit of anyone, but to the injury of the streets, and to the great damage of said Idaho Company, to wit, to its damage in the sum of \$187.50 and to the loss and waste of its waters to a large amount, to wit, to the amount of 1,500,000 gallons, of the value of \$187.50.

XXIX.

That in addition to said waters so taken, as aforesaid, by said city from said Idaho Company's waterworks the said city during the said sprinkling seasons of 1900 and 1901, in the same manner, took from said Idaho Company and from its said system of hot water pipes outside the limits of said city water to the amount of 1,000,000 gallons of the value and worth of \$125.00, for which water so taken, as aforesaid, said Idaho Company never received any pay or any compensation whatever, and for each and all of which defendant has continually since March, 1900, refused to pay and has proclaimed and given notice that it will take and never pay for same.

XXX.

That on, to wit, the 28th day of August, 1901, said Idaho Company decided, resolved and determined to go out of business and out of existence and to make plaintiff its successor in its said business and to all its rights, properties, privileges, franchise, claims, contracts, demands and pursuant thereto did turn over and transfer, assign and convey to plaintiff all its properties, business, claims, demands, accounts, rights, privileges, franchise, waterworks and all pertaining thereto, and all claims, rights, contracts connected therewith, and all moneys, damages and claims due or owing to it, arising either from contract, or from torts or trespasses, or from noncontract sources, including its said claim and all and every claim against said defendant, or any other person or persons, and said plaintiff did then accept the same and enter into the same and go on, in and with said business, and did

assume and agree to pay all claims of every nature and description of said Idaho Company, did enter into and carry on and out all its business and contracts and duties and obligations with or to other persons, and in every way, manner and respect became its successor. And ever since said 28th day of August, 1901, plaintiff has been and is in every respect and for every purpose the successor of said Idaho Company and is so known, and recognized by defendant and by all persons, and as such successor deals and has dealt with defendant and all other persons, and by all has been and is so accepted, known, recognized and acknowledged. And in accordance with said decision and determination of said Idaho Company to so make plaintiff its successor and to cease to exist, said Idaho Company caused such proceedings to be had in an action brought by it in the District Court of the Third Judicial District of the State of Idaho, County of Ada; that the judgment and decree of said court has been made and entered therein dissolving said Idaho Company, and said Idaho Company does not now exist, and in its place and stead, and as its successor is this plaintiff; and plaintiff is now the owner and operator of said waterworks, properties, rights, claims and privileges, and has continuously since said date carried on said business, performed all of said and all contracts, duties and obligations of said Idaho Company, dealt with defendant and all persons concerning the same as such successor, owner and operator and as obligor of all obligatory on said Idaho Company and as obligee of all due to, owing to or demandable by said Idaho Company, had it not ceased to exist, and had not

plaintiff become its successor. And for a further and second cause of action plaintiff alleges:

I.

That it refers to and makes a part of this cause of action the following portions of the foregoing complaint and first cause of action, to wit, the title and introduction, the allegations numbered I, II, III, IV, V, VI, VII, VIII, IX, X, XI, XV, XVII, XIX, XX, XXI, XXII, XXV.

II.

That on the 28th day of August, 1901, plaintiff became and was and ever since has been the successor of said Artesian Hot and Cold Water Company (also herein called the "Idaho Company"), and as such took, held and has possession of all the business, properties, rights, franchises and privileges formerly owned, held, possessed and enjoyed by said Idaho Company, and at all times since August 28, 1901, has carried on the water company business in the same manner and under like circumstances, conditions and contracts as the business had been carried on in said year of 1901 prior to said date of successorship by said Idaho Company.

III.

That at all times since the 28th day of August, 1901, the said waterworks, waters, pipes and properties have been in same state and condition and under same advantages, and disadvantages, under same burdens, obligations and duties, and surrounded by same circumstances as they were in said year prior to August 28th, 1901. That at all times since said time when plaintiff became such said successor of said Idaho Company the defendant has

been surrounded by like circumstances, under same conditions, duties and obligations, and in like relation respecting said waters, waterworks and properties as it was prior to August 28th, 1901, and has conducted itself in same manner toward plaintiff as it did toward said Idaho Company in said year prior to the date of said successorship.

IV.

That at all times since August 28th, 1901, said defendant, without plaintiff's consent against the notice and protest of plaintiff and wrongfully, has maintained and enforced the provisions of Ordinance No. 104 of said city requiring plaintiff to furnish water to said city for street sprinkling free of charge, and without compensation or promise of compensation, and has wrongfully and by force taken and caused to be taken from plaintiff's waterworks its said waters, and used the same upon the streets of said city, both at street and alley crossings and at the portions and parts of streets in front of properties and lots owned and occupied by private persons, and has wrongfully meddled with, tampered with, changed and interfered with plaintiff's said waterworks and properties, all without plaintiff's consent, and against protest of plaintiff and by force, has continuously taken said waters for street sprinkling purposes, both its hot water from its hot water pipes and system, and its cold waters from its cold water pipes and system; and has claimed and does claim to do so by right under said ordinance and otherwise, and has done all this with notice that it will pay nothing for said waters or any of them, and that it is entitled to plaintiff's said waters for street sprink-

ling free of charge, and defendant, to obtain said waters, took and takes control of, took and takes possession of and uses, by force, plaintiff's said stand-pipes and water pipes, valves and machinery, wrongfully, forcibly and against the wishes, without the consent, and under protest of the plaintiff; that defendant has not only during said time taken plaintiff's said waters for such street sprinkling purposes, but has also wasted said waters and large quantities of the same, and has so improperly and unskillfully taken said waters, and used and handled plaintiff's pipes and properties as to allow and cause large quantities of said waters to be wasted and lost, and so as to cause great damage to plaintiff.

V.

That defendant has during said times—that is, from the 28th day of August, 1901, down to the first day of January, 1902, so taken of plaintiff's said waters, from its said water pipes and system, waters to the amount of 25,480,000 gallons and used and caused the same to be used upon its streets for sprinkling the same.

VI.

That during said year of 1901 from and after August 28th, defendant in so taking said waters for sprinkling its streets and by and in consequence of its wrongful using and meddling with plaintiff's said waterworks and properties has wasted and caused to be wasted, of plaintiff's said waters, waters to a large amount and to the amount, as plaintiff is informed and believes, of 16,000,000 gallons, to plaintiff's great damage and injury and to plaintiff's damage of two thousand dollars.

VII.

That the waters taken for street sprinkling by defendant were then and there of the worth and value of twelve and one-half cents per thousand gallons and of the worth and value of \$3,160.00.

VIII.

That the waters of plaintiff so wasted and caused to be wasted by defendant were then and there of the value of and worth of twelve and one-half cents per thousand gallons and of the total value of \$2,000.00.

IX.

That of the waters so taken and used by defendant for sprinkling of its streets in said year 1901 and since August 28th of that year, defendant took and used for sprinkling such portion of its streets as were street intersections and alley crossings, water of the then value of \$760.00, to plaintiff's damage \$760.00, and took and used for sprinkling such portions of its streets as were in front of lots owned by other and private persons waters of the value of \$2,300.00.

X.

That of the waters so taken and used by defendant during said time for street sprinkling a large portion was for street sprinkling, and so used, on the streets of said city in blocks where said Peter Sonna furnishes water to the inhabitants thereof and those doing business thereon, and as plaintiff is informed and believes, to the great worth, value and amount of, to wit, \$900.00, and so alleges, and to plaintiff's great damage then and there, to wit, in the sum of \$900.00.

Wherefore plaintiff demands judgment against defendant for: First, for damages in the sum of \$15,560.00; second, for costs of this action.

KINGSBURY & KINGSBURY,
Attorneys for Plaintiff.

State of Idaho, }
County of Ada. } ss.

B. S. Howe, being duly sworn, says: I am secretary of the Boise Artesian Hot and Cold Water Company (Limited), plaintiff in the above-entitled action; I have read the foregoing complaint and know the contents thereof, and that the same is true of my own knowledge, except as to those portions stated on information and belief and as to those portions I believe it to be true.

B. S. HOWE.

Subscribed and sworn to before me this 12th day of February, 1902.

[Seal]

W. S. BRUCE,
Notary Public.

[Endorsed]: No. 199. Circuit Court of the United States, District of Idaho. Boise Artesian Hot and Cold Water Company (Limited), Plaintiff, vs. Boise City, Defendant. Complaint. Filed February 12, 1902. A. E. Richardson, Clerk. Kingsbury & Kingsbury, Attorneys for Plaintiff.

*In the Circuit Court of the United States for the District of
Idaho, Central Division.*

BOISE ARTESIAN HOT AND COLD

WATER COMPANY, Limited,

vs.

BOISE CITY.

No. 199.

Summons.

The President of the United States, to Boise City, the
Above-named Defendant, Greeting:

You are hereby commanded to be and appear in the
above-entitled Court, holden at Boise in said District,
and answer the complaint filed against you in the above-
entitled action within twenty days from the date of the
service of this summons upon you, if served within the
county of Ada in said District, or if served within any
other county of said District, then within forty days from
the date of such service upon you; and if you fail so to
appear and answer, for want thereof, the plaintiff will
take judgment against you for the sum of \$15,560.00, to-
gether with costs of suit, upon the grounds set forth in
plaintiff's complaint on file herein, a certified copy of
which said complaint is served herewith and made a part
hereof. Said demand being a claim of plaintiff for dam-
ages for taking water for street sprinkling for the years
1900 and 1901, of the value above and damages set forth,
on two causes of action—first, for \$10,500.00 on account
of damages sustained by plaintiff's predecessor; second,

for \$5,060.00 on account of damages sustained by plaintiff.

And this is to command you the marshal of said District, or your deputy, to make due service and return of this summons. Hereof fail not.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of the Supreme Court of the United States, and the seal of said Circuit Court, affixed at Boise in said District this 12th day of February, 1902.

[Seal]

A. L. RICHARDSON,
Clerk.

MARSHAL'S RETURN.

I certify that I received the within summons at Boise, Idaho, on the 12th day of February, 1902, and that I made personal service of the same upon H. C. Parnell, as president of the council and acting mayor of Boise city, Idaho, on the 12th day of February, 1902, by delivering to, and leaving with him a true copy of this summons, together with a certified copy of the complaint in said cause.

Fees \$4.00.

F. C. RAMSEY,
United States Marshal.

[Endorsed]: No. 199. In the Circuit Court of the United States for the District of Idaho, Central Division. Boise Artesian Hot and Cold Water Company, vs. Boise City. Summons. Returned and filed February 13, 1902. A. L. Richardson, Clerk.

*In the Circuit Court of the United States, for the District of
Idaho.*

BOISE ARTESIAN HOT AND COLD
WATER COMPANY, Limited,

Plaintiff,

vs.

BOISE CITY,

Defendants.

Demurrer.

Comes now the defendant and demurs to the plaintiff's complaint, and for grounds of said demurrer, says:

1.

That the Court has no jurisdiction of the subject of this action in that appears:

(A) That the first alleged cause of action is upon a claim alleged to have been assigned and transferred to the plaintiff, and that it further appears that the assignor could not have maintained an action upon said claim in the United States Circuit Court, for the reason that it is a citizen of the same state as defendant.

(B) That the second alleged cause of action is upon a claim alleged to have been assigned and transferred to the plaintiff, and that it further appears that the assignor could not have maintained an action upon said claim in the United States Circuit Court for the reason that it is a citizen of the same state as the defendant.

2.

That said complaint does not state facts sufficient to constitute a cause of action in that it appears, upon the face of the complaint:

(A) That this is an action to recover from the defendant city for the value of water used by the said city for fire and other great necessities, which, according to the laws of the State of Idaho, is to be furnished without charge.

(B) That the defendant is a duly organized municipal corporation under the laws of the State of Idaho, and that the plaintiff is a corporation formed to supply water to said city or municipal corporation, and that it is seeking to recover for the use of water used by said city for fire and other great necessities.

JOHN J. BLAKE and
W. E. BORAH,
Attorneys for Defendant.

State of Idaho, }
County of Ada, } ss.

I, W. E. Borah, one of the attorneys for the defendant, hereby certify that, in my opinion, the foregoing demurrer is well founded in point of law.

W. E. BORAH,
Attorney for Defendant.

State of Idaho, }
County of Ada, } ss.

Moses Alexander makes solemn oath and says: That he is the duly elected, qualified, and acting mayor of the

above corporation, the defendant, and that the foregoing demurrer is not interposed for delay.

M. ALEXANDER.

Subscribed and sworn to before me, this third day of March, 1902.

[Seal]

H. W. DUNTON,
Notary Public.

Received copy of the above demurrer this 3d day of March, 1902.

S. B. KINGSBURY,
Attorney for Plaintiff.

[Endorsed]: No. 199. United States Circuit Court, Central Division, District of Idaho. Boise Artesian Hot and Cold Water Company, vs. Boise City. Demurrer. Filed March 3d, 1902. A. L. Richardson. Clerk.

At a stated term of the Circuit Court of the United States, for the District of Idaho, held at Boise, Idaho, on the 10th day of March, 1902. Present: Honorable JAS. H. BEATTY, Judge.

BOISE ARTESIAN HOT AND COLD
WATER COMPANY,

vs.

BOISE CITY.

} No. 199.

Order for Leave to Withdraw Demurrer.

Now came the defendant, by its attorneys of record, and by leave of Court, withdrew the demurrer heretofore filed to the complaint herein.

Tuesday, March 11, 1902.

BOISE ARTESIAN HOT AND COLD
WATER COMPANY,

vs.

BOISE CITY.

No. 199.

**Notice of Motion to Set Aside Order Allowing Defendant to
Withdraw Demurrer.**

Now came the plaintiff, by its attorneys, and gave notice in open court of motion to set aside order heretofore granted, giving defendant leave to withdraw its demurrer to the complaint herein.

Tuesday, March 18, 1902.

BOISE ARTESIAN HOT AND COLD
WATER COMPANY,

vs.

BOISE CITY.

No. 199.

Order Correcting Entry Allowing Withdrawal of Demurrer.

On motion of counsel for plaintiff, A. A. Fraser, Esqr., was entered of record as additional counsel for plaintiff. The plaintiff's motion to set aside the order heretofore entered giving defendant leave to withdraw its demurrer to the complaint herein coming on to be heard, the respective counsel being present, it was ordered that said order be corrected to read that said defendant waive the said demurrer instead of withdrawing the same, and upon motion the said plaintiff was given twenty days from this date to plead to the answer herein.

*In the Circuit Court of the United States, Central Division,
District of Idaho.*

BOISE ARTESIAN HOT AND COLD WATER COMANY, LIMITED,	}	Plaintiff,
vs.		
BOISE CITY,	}	Defendants.

Answer.

Comes now the defendant and for answer to the complaint of plaintiff, admits, denies and alleges:

1.

The defendant has no knowledge, information or belief sufficient to enable it to answer any or either of the allegations in paragraph one of plaintiff's complaint, and it therefore denies each and every of said allegations in said paragraph contained.

2.

Denies that the amount involved in this controversy, or to recover which this action is brought, exceeds the sum of five thousand dollars (\$5,000), exclusive of interests and costs, or exclusive of interests or costs, or that it involves any sum whatever.

3.

Defendant admits that during all of the times herein mentioned, subsequent to March 28, 1891, and down to

August 28, 1901, said Idaho Company was the owner of the waterworks referred to in the complaint, and waters of great value; admits that on October 3, 1889, Boise City enacted, ordained, and passed the ordinance referred to and set forth in paragraph five of plaintiff's complaint, but as to the other and further allegations, matters and things in said paragraphs four and five of plaintiff's complaint contained, defendant has not sufficient knowledge, information or belief to enable it to answer any or either of said allegations, and it therefore denies each and every of the other and further allegations in said paragraphs contained.

4.

That defendant has not sufficient knowledge, information or belief to enable it to answer any or either of the allegations in paragraph six of plaintiff's complaint, and it therefore denies each and every of said allegations in said paragraph contained.

5.

Denies that the Boise Waterworks Company, a corporation, formed and organized under the general laws of Idaho, as a private corporation, as successors to said Eastman Brothers, assumed no duties or liabilities, pertaining to said waterworks or to said franchise than such as appertained to the same in the hands of said Eastman brothers or to said Eastman brothers; denies that such corporation was, by all or any person or by this defendant, recognized or treated as having such duties or liabilities only as pertained to the said water system in the hands of said Eastman brothers, or to said Eastman brothers, but alleges the fact to be that said

corporation assumed all the duties and liabilities appertaining to said waterworks and water system, and to corporations, as provided by the laws of the State of Idaho.

6.

Denies that the Artesian Hot and Cold Water Company, hereinbelow designated for convenience the Idaho Company, assumed all or any of the liabilities or duties pertaining to said waterworks or in like manner or with like limitations as were assumed by or were obligatory upon the said Eastman brothers; denies that during all these times or at all, the said company did or performed all it was obligated to do by virtue of such operation, ownership or successorship, as will be hereinafter more specifically set forth.

7.

Defendant has not sufficient knowledge, information or belief to enable it to answer any or either of the allegations in paragraph nine of said plaintiff's complaint contained, and it therefore denies each and every of said allegations in said paragraph contained.

8.

Defendant denies that said Idaho Company so dealt or was dealt with during all times or at any time down to August 28, 1901, or ever or at all, so dealt or was dealt with by this defendant as the successor of said Eastman brothers in or to the rights, privileges or franchises, or in all or any of the things that pertained to said waterworks, or that belonged to said Eastman brothers as the operators of said waterworks, or as being under said rights or privileges, in the hands of said Eastman broth-

ere, or as being under any of the rights or privileges in the operation of said waterworks; but alleges the fact to be that this defendant at all times dealt with said Idaho Company, as a corporation, organized and existing under and by virtue of the laws of the State of Idaho, for the purpose of supplying cities or towns with water, and that said Idaho Company dealt and was dealt with by this defendant during all the time as such corporation so organized and existing with all the duties and obligations belonging and appertaining to such corporations, and not, in any sense, as the successor of said Eastman brothers, in the operation of said waterworks; denies that said Idaho Company was, at any time, or at all, by this defendant known, recognized or dealt with or acknowledged as such successor of said Eastman brothers in the operation of said waterworks, and alleges the fact to be that the said Idaho Company had no other rights, privileges or franchises than those which were imposed upon it by the laws of the State of Idaho, and did not have and could not exercise any other rights or privileges than those so specified.

9.

That as to the allegations in paragraph eleven of said complaint, to wit, that the ordinary and necessary demand for water from said waterworks required, at no time during the last five years, any pumping except by one pump, and for the space of not to exceed four hours each day, and for most of that time no pumping was required at all for ordinary uses, while to supply the water for such ordinary and necessary use during these times of the customers of said company, and, at the

same time, to furnish waters used for street sprinkling by the defendant, as hereinafter set forth, did, at all times, during the sprinkling seasons for the years 1900 and 1901, require the whole capacity of a large pumping plant of two large pumps run nearly every hour by day and night, this defendant has not sufficient knowledge, information or belief to enable it to answer any or either of said allegations, and it therefore denies each and every of said allegations; denies that the said Idaho Company was compelled to do this pumping, or any pumping, by reason of the wrongful or any acts of this defendant; denies that the said company did this pumping or extra pumping at any time or at all by reason of the wrongful or any acts upon the part of the defendant.

10.

Denies that the said Idaho Company has continually or at all had dealings with Boise City or Ada County or the State of Idaho, as successor or by virtue of being successor of said Eastman brothers, but alleges the fact to be that said company has, at all times, dealt with this defendant, Ada County, and the State of Idaho, as a corporation, organized under the general laws of the State of Idaho, with all the duties and liabilities of such corporations, for the purpose of supplying cities and towns with water, and in no other manner and by virtue of no other authority, rights or privileges has said company dealt or been dealt with; denies that, as such corporation and as such successor of Eastman brothers, or as such corporation, or as successor of Eastman brothers, or in any capacity, or at all, said company has, at any time, or at all, furnished this defendant city or the inhabitants thereof, for fire purposes or for sprinkling

its streets, or for heating its buildings, or for any other purposes, water for a reasonable compensation, or that it has, at any time or at all, furnished water for said or any purposes, or at all, as the successor or by virtue of being the successor of Eastman brothers; denies that said Idaho Company, has, at any time, or at all, maintained stand-pipes or any stand-pipes in all or any parts of the defendant city, where, by contracts, it was obligated so to do, and denies that it could or was, at any time, obligated by contract to furnish stand-pipes or any stand-pipes at any place or at all within said city, or that it erected or maintained eighteen or any stand-pipes by virtue of any agreement, and denies that it was or could be obligated by agreement so to do.

11.

Denies that said Idaho Company did any or all of the things it was required to do or was obligated to do under said alleged contract or otherwise; denies that said Idaho Company was or could be obligated, by or under said alleged contract, to erect or maintain, at its own or anybody's expense, stand-pipes for the taking or use of its waters by this defendant, except as obligated by law as hereinafter more specifically set forth; denies that said company was or could be, by or under said alleged contract, obligated to erect or maintain, at its own or anybody's expense, stand-pipes for the taking or use of its waters at any place beyond the territorial extent of its voluntarily created physical and mechanical means of furnishing water for family use or for fire or other great necessity, or otherwise obligated so to do, as already devolved upon it as a corporation organized under

the laws of the State of Idaho, and formed for the purpose of furnishing a city or town with water and to the extent of its means as voluntarily created in the regular course of its business.

12.

Denies that this defendant had continually or at all dealings with such water company as the successors in interest, ownership, or operation, of said waterworks, rights or properties or at all other than as hereinafter specifically alleged; denies that said Idaho Company dealt with this defendant as such water company or that the defendant dealt with or was dealt with by said Idaho Company otherwise than as a corporation organized under the general laws of the State of Idaho, with all the duties and obligations appertaining and formed for the purpose of supplying a city or town with water for family uses and for fire purposes and other great necessities; alleges that the dealings referred to in paragraph fourteen of plaintiff's complaint and alleged to have been had by and between said Idaho Company and this defendant by virtue of contracts, were not performed or carried out reasonably or fairly or legally.

13.

The defendant has not sufficient knowledge, information or belief to enable it to answer any or either of the allegations in paragraph fifteen of said complaint, and it therefore denies each and every of said allegations in said paragraph contained.

14.

Denies that the said Idaho Company has not assented to or accepted or recognized the validity or binding effect

of the ordinance of this defendant granting to said Idaho Company the right to collect charges for water supplied to the inhabitants thereof, which ordinance is specifically referred to in plaintiff's complaint; denies that, after the passage of said ordinance or at all, this defendant took or caused to be taken water of the said Idaho Company from its water pipes or otherwise by force or at all other than as hereinafter specifically alleged; denies that under or by virtue of said ordinance or at all, the police of this defendant city protected or enforced the taking of said water or the meddling with the waters or the pipes or the property of said company; denies that this defendant, by its police or police power or in any manner, enforced said ordinance or that it took the water for the street sprinkling or for any other purpose by force other than as hereinafter specifically alleged.

15.

Denies that, at all times or at all since March, 1900, or prior to August 28, 1901, or at any time or at all, this defendant took over two hundred and fifty thousand (250,000) gallons of water each on any day or any amount of water from said waterworks system of the said Idaho Company, by force or at all or in any manner other than as hereinafter specifically alleged; denies that, by reason of said alleged taking or of any act or acts upon the part of this defendant, the Idaho Company was damaged at any time or at all in the sum of fifty-five dollars (\$55.00) each day, or in any sum whatever, and alleges the fact to be that the said Idaho Company was not, in any manner or at all, damaged in any sum whatsoever, by reason of any act or acts upon the part of this defendant.

16.

Denies that one Peter Sonna or any other person or persons, firm or association exercises rights, privileges or franchises in the supplying of water to the inhabitants of Boise City under the same or like kind of powers or privileges or under the same or like grants or franchises as those of the said Idaho Company; denies that any other person or persons enjoy or enjoys or during said last four years or any years or at all have enjoyed grants or rights or privileges with the said Idaho Company in supplying Boise City or its inhabitants with water; and alleges the fact to be that the said Idaho Company has alone enjoyed the rights, privileges and franchises of supplying water to Boise City and the inhabitants thereof; denies that this defendant city has, by force, taken water from said Idaho Company at any time or at all; denies that it took water, proclaiming that no compensation need be or would be given for the same, because said company was a corporation, or in any other manner or with any other purpose or motive than as hereinafter specifically alleged.

17.

Denies that immediately or at all after the passage of said ordinance or at all, the defendant, by its officers, agents or servants, or otherwise or at all, by force, took possession of any stand-pipes or fire hydrants or either of them, forcibly or in any other manner or way than as hereinafter specifically alleged; denies that from or through said stand-pipes of the plaintiff or said fire hydrants, or either of them, this defendant took water wrongfully or willfully or by force at any time or at all

for any purpose or at all other than as hereinafter specifically alleged; denies that this defendant, in any manner or at all, or by reason of any act or acts, damaged or injured the said Idaho Company or damaged or injured any other company in the sum of eleven thousand dollars (\$11,000) or in any sum whatsoever, but alleges the fact to be that the said Idaho Company nor this plaintiff has not, by reason of any act or acts upon the part of this defendant, suffered damage or been injured to the amount of eleven thousand dollars (\$11,000), or any sum or sums whatsoever.

18.

Denies that there was no great necessity or necessity upon this defendant for taking said Idaho Company's water during said times for street sprinkling and other purposes; denies that it wrongfully took said waters or that it took said or any waters from the Idaho Company wrongfully or for any purpose or at all other than as hereinafter specifically alleged.

19.

Denies that during the years 1900 or 1901 or at any time or at all, this defendant wrongfully took water from said Idaho Company or from the stand-pipes of said company or its hydrants either within or without said city or in any other manner than as hereinafter specifically alleged; denies that during said years or at any time or at all, this defendant took the water from either or any of said stand-pipes or fire hydrants other than as hereinafter specifically alleged.

20.

Denies that the Idaho Company could not have prevented or stopped the defendant from taking its said water without shutting off all or any of its supply of water to its customers, or without interfering with or preventing its own use of said waters or endangering all or any of the property of said city or other properties in any manner, or at all, or the lives or health of the inhabitants of said city.

21.

Denies that said Idaho Company was, at any time, unable to go to the cost or expense or labor of furnishing, free water to this defendant, or that it was unable to furnish, free of charge, the waters required by this defendant or taken during the times aforesaid for street sprinkling or other purposes; denies that such demand or demands were beyond the means of such water company; denies that the cold water system or any other water system of said waterworks must be, under the circumstances given or under any circumstances, run without profit or at a loss to its owners or operators for any reason or at all or because of water taken from it for street sprinkling or for any purpose, and denies that, for any reason or at all, said waterworks or waterworks system has been run or must be run without profit or with loss to the owners.

22.

Denies that the waters taken by the defendant for street sprinkling or for any other purpose were unnecessarily or wrongfully taken or taken in any other manner than as hereinafter specifically alleged.

23.

Denies that, in the year 1900, or at any time or at all, said defendant took from the Idaho Company's waterworks for street sprinkling or for any purpose forty-nine million three hundred and seventy thousand (49,370,000) gallons, or any water, other than as hereinafter specifically alleged, and denies that, by reason of the taking of said water or any water, the said company or any other company or anyone was damaged in the sum of ten thousand five hundred dollars (\$10,500), or any sum or amount whatsoever, and alleges the fact to be that neither the said Idaho Company nor any other company has been, by reason of the taking of any water upon the part of the defendant or by reason of any act or acts upon the part of the defendant, damaged in any sum or in any manner whatever.

24.

Denies that the water so taken by said city during the years 1900 or 1901 from said company's waterworks was, in any manner or at all, taken for the benefit of certain persons as owners of lots abutting on streets sprinkled, or for the purpose or with the intent or design of saving said owners a portion or any of the cost or expense of such sprinkling; denies that such taking had the effect of taking the water or property of the Idaho Company and giving it to other persons or to any persons free of charge; denies that the amount so taken was taken for the benefit of any owners of abutting property; denies that the water so taken was taken to the damage of said Idaho Company or to the damage of anyone to the amount of seven thousand five hundred dollars (\$7,500), or to any

other amount, or to the damage of said Idaho Company, or to anyone else in any manner or at all; denies that this defendant city tampered with or meddled with said Idaho Company's pipes and fire hydrants or pipes or fire hydrants; denies that, in the taking of waters for street sprinkling or otherwise, during the years 1900 and 1901, by this defendant, in any manner or at all or at any time or times, which caused great or unnecessary or any waste of water; denies that large or any quantities of water were allowed to run or did run to no benefit, or that the same was allowed, in any quantity or at all, or by any manner of taking, to run to no benefit or use or to the great or any damage of said Idaho Company, or to the great or any damage of anyone in the sum of one hundred and eighty-seven dollars and fifty cents (\$187.50), or in any sum whatever, or to the loss or waste of water to the amount of one million five hundred thousand (1,500,000) gallons, or to any amount or of any value whatever.

25.

Denies, on information and belief, that on the 28th day of August, 1901, or at any time or at all, the said Idaho Company, decided or resolved or determined to or did go out of business or out of existence, or to make plaintiff its successor in its said business or to all its rights, properties, privileges, franchises, claims or contracts or demands; denies, on information and belief, that pursuant to said or any decision or at all, said Idaho Company did turn over or transfer or assign or convey to plaintiff all or any of its properties or business or claims or demands or accounts or rights or privileges or

franchises or waterworks, or all or any of its claims or rights or contracts connected with said business, or all or any of its moneys or damages or claims due or owing to it either from contract or from tort or trespass or from noncontract sources, or its claim or any claim against this defendant, and defendant alleges that, at no time, did the said Idaho Company have any claim of any nature or kind against this defendant, and that said Idaho Company did not and could not transfer its rights, privileges or franchises in and to the furnishing of water to the inhabitants of Boise City and to Boise City, as required by law, without the consent of this defendant; denies, on information and belief, that said plaintiff did, at any time or at all, accept or could accept the business or the rights, properties, privileges, franchises, claims or contracts or demands of the said Idaho Company, or that it entered into the possession of the same, or go on in or with said business, or assumed or agreed to pay all or any claims of said Idaho Company, or did enter into or carry on or out all or any of the business or contracts or duties or obligations with or to any other person or in any other way or manner or respect whatever; denies, on information and belief, that since August 28, 1901, or at any other time, plaintiff has been, in any respect or at all or for every purpose or in any manner or at all, the successor of the said Idaho Company; denies that the plaintiff is or has been known or recognized or treated by this defendant as the successor of the said Idaho Company, or that the plaintiff, as such successor, deals or has dealt with this defendant, or that by the defendant the plaintiff has been or is accepted,

known or recognized as the successor of said Idaho Company; denies, on information and belief, that in the place or stead of said Idaho Company or as its successor, is this plaintiff; denies, on information and belief, that the plaintiff is now, or at any time has been, the owner or operator of said waterworks, properties, rights, claims or privileges; denies, on information and belief, that plaintiff has continuously or at all, since August 28, 1901, or at any time, carried on the business or performed all or any of the acts, duties or obligations of said Idaho Company; denies that the plaintiff dealt with the defendant concerning all or any of said alleged contracts or duties or obligations of said Idaho Company, or dealt with the defendant concerning any contract, duty or obligation as such successor, or dealt with the defendant as owner or operator or as obligor of said Idaho Company, and denies that plaintiff has, at any time or at all, or in any manner, become the successor of the Idaho Company.

26.

Defendant, further answering first cause of action herein, says:

(A) That, at the date of the passage of the ordinance set forth in paragraph 5 of the complaint, and long prior thereto, the said H. B. Eastman and B. M. Eastman had laid and repaired their water pipes in, through and along and across the streets and alleys of Boise City and had exercised already, prior to the passage of said ordinance, all rights and privileges, and enjoyed all benefits at any time by them exercised or enjoyed; that said ordinance was passed merely in confirmation of the rights already

assumed and did not confer, and was not intended to confer, upon said Eastmans any other rights or any greater rights, privileges or benefits than they had theretofore exercised and enjoyed, and said ordinance did not create or give rise to any special or exclusive exemptions or privileges, or create or give rise to any contractual relations of any nature or kind to or with the said Eastman brothers and this defendant.

(B) That the Boise Waterworks Company, a corporation organized and existing under the laws of the State of Idaho, was organized and formed for the purpose of furnishing water to the city of Boise, and that, as such, it became its duty to secure the authorization of this defendant city to supply said city with water, and thereupon to join with this defendant in selecting commissioners, as provided by law, to determine reasonable rates for water so supplied by said corporation for family use, and thereupon it became its duty to furnish pure, fresh water to the inhabitants of Boise City for family use, so long as supply permitted, and without distinction of person, upon proper demand therefor at rates as established by said commissioners, and to furnish water to the extent of its means in case of fire or other great necessity, free of charge, but all of which said duties said corporation failed, neglected and refused to do; that said corporation enjoyed no exemptions, rights, privileges or franchises other than those given and imposed by law upon such corporations, upon a full compliance with the law.

(C) That said Artesian Hot and Cold Water Company, a corporation formed and organized under the laws of

the State of Idaho, was formed and organized for the purpose of supplying water to the city of Boise, and as such became and was the successor of the Boise Waterworks Company and of the Artesian Water and Land Improvement Company, corporations organized and existing under and by virtue of the general laws of Idaho, formed for the purpose of supplying water to the city of Boise, and became bodies corporate for such purposes, subsequent to twelve o'clock, noon, June 1, 1887, and said Artesian Hot and Cold Water Company was and has been known and recognized only as a corporation organized and existing under the general laws of Idaho, formed for the purpose of furnishing water to the city of Boise, with all the duties and obligations appertaining to such corporations, and that, as such corporation, it became charged with the duty to secure the authorization of this defendant city to supply said city with water, and thereupon to join with this defendant city in selecting commissioners, as provided by law, to determine reasonable rates for water so supplied by said corporation for family use, and thereupon it became its duty to do each and every of the things required by the laws of Idaho, to be done by corporations so organized and formed for such purposes, including the furnishing of water to the extent of its means in case of fire or other great necessities, free of charge, but of which said duties of furnishing water at rates established by commissioners selected as provided by law, or to furnish water to the extent of its means in case of fire or other great necessities, said corporation failed, refused and neglected to do. That said Artesian Hot and Cold Water Company, continued to act

as such corporation, as defendant is informed and believes, and therefore alleges, until January ———, 1902. That, as such corporation so formed for the purposes aforesaid, the Artesian Hot and Cold Water Company, did not assume, nor was it relieved of any duty or liability imposed by law by reason of coming into possession of the waterworks formerly owned by said Eastman brothers, but acquired by transfer from the Boise Waterworks Company, a corporation organized in like manner and for like purposes as said Artesian Hot and Cold Water Company, and acquired the same, independent of any or all duties or liabilities or privileges or exemptions by anyone else held, owned or claimed, other than such duties, liabilities and obligations as were and are, by law, imposed. That it acquired and owned all the properties, rights, franchises and privileges of the Boise Waterworks Company and of the Artesian Water and Land Improvement Company, and operated the same as a corporation organized in the manner and for the purposes aforesaid, under the general laws of the State of Idaho, and, as such corporation, so operating said properties, rights, franchises and privileges, it became and was its duty to do and perform each and every of the things required of such corporation to be done in and about the furnishing of water to Boise City, including the duty to secure authorization by an ordinance of the defendant city to supply said city with water, and its further duty to furnish water to the extent of its means in case of fire or other great necessity, free of charge, but that, notwithstanding such duty to secure such authorization prior to March, 1900, no authorization, by ordi-

nance of said city, had been sought or given by the defendant to said corporation. That on April 9, 1900, the defendant city passed an ordinance granting to the Artesian Hot and Cold Water Company authority to furnish water to the inhabitants of Boise City, and to collect rates therefor, a copy of which said ordinance is hereto annexed, marked Exhibit "A," and made a part of this answer. Whereupon, said corporation became, for the first time, authorized to furnish water to the inhabitants of said city at reasonable rates, or at any rates or at all, for compensation. That said corporation continued to carry on its said business of supplying said city with water and of collecting rates therefor for water supplied to the inhabitants thereof for family use, after the enactment and approval of said ordinance and with full notice thereof, but at rates arbitrarily adopted, fixed and charged by it, and without reasonable rates having been determined by commissioners selected as provided by law for such purpose. That said corporation, incorporated in the manner and for the purposes aforesaid, and so authorized to furnish water as aforesaid to the inhabitants of said city, and continuing so to do subsequent to the passage and approval of said ordinance and with full notice thereof, assumed the duty and obligations to furnish to the inhabitants of Boise City water to the extent of its means in case of fire or other great necessity, free of charge, but to furnish the same free of charge for street sprinkling and other great necessities in said Boise City, to the extent of its means or otherwise, free of charge, said corporation failed, refused and neglected, and continues to so fail, refuse, and neglect to do. That,

at no time, nor by reason of any grant, ordinance or contract, either with said Idaho Company or with anyone else, has it been relieved or exempted from the duties imposed by law upon corporations organized for the purposes aforesaid.

(D) That prior to April 19, 1900, the said Artesian Hot and Cold Water Company, as such corporation, formed in manner and form and for the purposes aforesaid, was without authority of law to exercise the rights, privileges or franchises of furnishing water to the inhabitants of Boise City for rates or compensation, for the use of water supplied to said Boise City or the inhabitants thereof for family use, and that said corporation exercised said right, privilege and pretended franchise without authority of law and in a manner other than prescribed by law, and after the passage and approval of said ordinance, and after full notice thereof, continued to so exercise said pretended franchise in a manner contrary to law and contrary to the duties and obligations imposed by law.

That said corporation was without authority to contract concerning rates or compensation for the supplying of its water to the inhabitants of Boise City for family use or for furnishing water to the extent of its means in case of fire or other great necessity; that no rate to be charged for water for family use had been determined by commissioners selected as provided by law, and which said rate said corporation was authorized to charge, collect or receive for water supplied by it for family use, or for fire or street sprinkling or other great necessity, nor could such commissioners determine any rate to be

charged, collected or received for any purpose denominated a great necessity. That, as to any pretended contracts made or entered into by and between said corporation and the owners or lessees of abutting property on streets sprinkled with water supplied by said corporation or as to any pretended contracts by and between said corporation and this defendant, concerning reasonable compensation, agreed rates or any rates or compensation whatever for water furnished by it for fire or street sprinkling purposes or other great necessities, the same were beyond the power of said corporation or of this defendant to make or exercise and against public policy, illegal and void.

That, as to any and every pretended contract by and between this defendant city and the said Artesian Hot and Cold Water Company, alleged to have been made and entered into in the year 1897, wherein it assumed to contract respecting the supplying of water for street sprinkling purposes or other great necessities at a reasonable agreed price or at any compensation, agreed rate or at any rate for such services, the said contracts and each and every of them were beyond the power of either said corporation or of this defendant city to make or execute, and the same were without consideration to this defendant and against public policy, illegal, null and void. That, as to each and every pretended contract by and between the said Artesian Hot and Cold Water Company, and this defendant, wherein and whereby this defendant agreed to purchase waters of the said corporation for street sprinkling purposes or for fire or other great necessities, the said contract was beyond the power of said corporation or of this defendant to make or

execute and, as to this defendant, was without consideration, and the same was against public policy, illegal and void.

(E) That said Artesian Hot and Cold Water Company, at all times since its incorporation as aforesaid, notwithstanding its duty to furnish water to this defendant for fire or other great necessity, free of charge, and notwithstanding that demand upon said corporation has been made on numerous occasions that it furnish such water for such purposes free of charge to this defendant, it has failed, refused and neglected so to do and has demanded compensation therefor, and demanded that contracts be entered into agreeing to pay for the same; that each and every of said pretended contracts, and particularly, the contracts, and each and every of them, alleged in paragraph 13 of plaintiff's complaint to have been made and entered into by and between this defendant and said corporation in each of the years 1898 and 1899, wherein and whereby said corporation pretended to assume any obligation to erect or maintain stand-pipes when and where requested by said defendant, and assumed to be authorized to charge, collect or receive certain rates, or any rates, for water for fire or other great necessities, or wherein or whereby this defendant assumed to contract for such service or the furnishing of said waters for street sprinkling purposes at certain rates or at any rates, and the entire of said contracts were beyond the power of either said corporation or this defendant to make, or execute, and that the same and each of them, and all things done or assumed to be done by either of the parties thereto under said contracts, or either or any of them, were and

are against public policy, that the same were and are without consideration as to this defendant, illegal, null and void.

(F) That, as to each and every of the pretended contracts alleged in paragraph 14 of plaintiff's complaint, by and between the Artesian Hot and Cold Water Company, and this defendant, and concerning the furnishing of water by said corporation to the inhabitants of this defendant for domestic use or for fire or other great necessities, or concerning the extra cost, labor, or expense alleged to have been incurred by said Artesian Hot and Cold Water Company in the furnishing thereof or in increasing its water pressure or in the erection of stand-pipes or in the increasing of its pumping plant or in the purchase of a steam-boiler, engine or pump, or in various other expenses to the extra cost as alleged, of over twenty thousand dollars (\$20,000) over and above what would otherwise have been or is required or necessary for supplying water to the patrons of said water-works for all other purposes than street sprinkling, or concerning any cost or extra expense or extra cost in any sum whatever, incurred by said corporation in furnishing water to the inhabitants of this defendant to the extent of every means created by said corporation for fire or other great necessity, the same is beyond the power of said corporation or of this city to make or execute and each and every of the contracts therein alleged to have been made or executed between said corporation and this defendant is without consideration upon the part of this defendant, against public policy, illegal and avoid.

(G) That each and every of the several and separate

contracts alleged in paragraph 16 of plaintiff's complaint to have been made and entered into by and between the Artesian Hot and Cold Water Company and this defendant for each of the years 1896, 1897, 1898, and 1899, relating to compensation for said water and for extra outlays and expenses were beyond the power of either said Artesian Hot and Cold Water Company, or of this defendant to make or execute, and were, as to any and every agreement of this defendant therein to pay to said corporation compensation for the use of water furnished by said corporation to this defendant city for municipal purposes in connection with its governmental or police powers, other than for such uses as are strictly family uses or as to any and every agreement to pay extra outlay or expense, and the entire of said contracts were without consideration to this defendant, against public policy, illegal, null and void.

(H) Defendant alleges that the sole authority, right, privilege and franchise of the Artesian Hot and Cold Water Company to supply Boise City with water was and is dependent upon authority conferred upon said corporation by Ordinance No. 304, passed and approved April 19, 1900, hereto annexed, as Exhibit "A," and by virtue of the law of the State of Idaho, relating to such corporations, and that the said company has no other rights, privileges or franchises or exemptions of any nature or kind; that said corporation continued to furnish water to said Boise City, and to the inhabitants thereof for family use and upon demand therefor and thereafter continued to assume to exercise a right and franchise to collect rates charged for water so furnished, thus and thereby, in so continuing so to supply water,

collect rates and to exercise the rights and privileges and franchises of a corporation organized under the general laws of the State of Idaho, formed for the purpose of supplying a city or town with water, the said corporation assented to, accepted and recognized the validity and binding effect of said ordinance and the duties and obligations imposed by law, and was thereunder, and as such corporation, so organized in manner and form, and for the purpose aforesaid under the duty and obligation, and legally required to furnish this defendant city water to the extent of its means in case of fire or other great necessities, free of charge; that thereupon, this defendant city served written demand upon said corporation that it furnish water for fire and for sprinkling streets in Boise City, a copy of said demand being hereto annexed, marked Exhibit "B," and made a part of this answer, along with which was served, also, a copy of the ordinance of Boise City, No. 304, and thereupon and thereafter took the waters of said corporation from its stand-pipes and other means of furnishing the same and within means created by said corporation; and by its authority as the governmental power of Boise City, and as the agency of the inhabitants thereof for the use of waters furnished for fire or other great necessities to said city, and in a skillful manner, and without waste, this defendant took said water alleged in plaintiff's complaint to have been so taken for fire and sprinkling purposes, as it might of right do, without any liability for any rates or compensation whatsoever therefor, and without let or hindrance from said corporation while so doing, and taking, and that said water was wholly without value in contemplation of law as to said com-

pany, as the said company was not permitted to charge for the same; that Boise City is situated in a dry and arid region; that by reason of a large and growing traffic in and upon and over the streets of said city and during the months when there is not sufficient rainfall to keep the said streets free from dust, the same become deep with dust, and the same is raised by passing vehicles, horsemen and stock driven in and over said streets and through said city and fills the air therewith, and the same becomes offensive to the senses, unhealthful to breathe, and dangerous to the life and health of the inhabitants of said city, whereby and by reason thereof, the sprinkling of said streets to the extent of the means furnished by said company, was and is a great necessity, and for such and under such circumstances, the said water was taken.

(I) That the Artesian Hot and Cold Water Company is a corporation, organized under the general laws of Idaho, for the purpose of supplying Boise City, with water, and enjoys all of the rights, privileges, and powers granted to a private corporation, organized for such purposes, under the laws of Idaho, and no other; that, by and under the terms of its charter, from the State of Idaho, it became charged with the duty and obligation of furnishing water to the extent of its means, in case of fire or other great necessities, free of charge, to the city in the exercise of its police and governmental power, but without compensation for water so furnished or used; that by the constitutional and statutory provisions of the State of Idaho, the same being also a part of said corporation's charter, it is provided that rates to be charged for water must be determined by commission-

ers to be selected, two by the water company and two by the city or town authorities, and further as provided by law in case of their disagreement as to valuation; that said commissioners are thereupon authorized to determine the rate to be charged for water for one year and until new rates are fixed by the action of a majority of said commissioners; that it is the duty of said commissioners to fix reasonable rates for water furnished for family use, and that for such use only are said commissioners authorized to fix any rate. That, for the purpose of determining the reasonableness of the rate fixed for such family use, all conditions entering into the cost to a water company of maintaining a plant and supplying such water, and all water for fire or other great necessities, furnished to the city, free of charge, may be taken into consideration, and such a rate fixed for such family use as shall furnish a profit upon the amount clearly and necessarily invested in the business of such water company; that the right to collect rates or compensation, for the use of water supplied to any city or town, or inhabitants, thereof, is a franchise, and cannot be exercised except by authority of and in the manner prescribed by law. That heretofore and in continuing to the present time, no measure has been prescribed by law, providing for the exercise of such franchise in Boise City by other than corporation organized under the laws of the State of Idaho, formed for the purpose of supplying cities and towns with water; that plaintiff is the sole and only corporation now, or at any time heretofore so organized, or authorized to furnish water in said city, for rates of compensation; that it is the sole and only corporation now, or at any time,

hereinbefore actually engaged in supplying water to the inhabitants of Boise City, and having a franchise, and in manner provided by law under which it is authorized to collect rates for the furnishing of water for family use or from which defendant can demand, require or take water for street sprinkling, fire or other great necessities, free of charge, or for any purpose, or at all; that no other person, persons, firm or association or corporations, is or are by law authorized to collect rates or compensation for furnishing water to the inhabitants of Boise City for family use.

(J) That as to each and every of the pretended contracts alleged in paragraph 12 of plaintiff's complaint, to have been made by and between the Artesian Hot and Cold Water Company, and this defendant, the same were beyond the power of either said corporation or this defendant to make or execute, and each and every of said pretended contracts was, as to this defendant, without consideration, against public policy, illegal, null and void.

(K) That the taking of the waters alleged in the plaintiff's complaint, to have been taken by defendant for street sprinkling purposes was a great necessity to this defendant, by reason of the facts hereinbefore alleged as to the necessity for said sprinkling, and that said water, under the law, was not of any value to the plaintiff or the Idaho Company; that, by reason of such necessity, the Artesian Hot and Cold Water Company, as such corporation, organized, formed and authorized as aforesaid, was, at all times, and is charged with the duty and obligation of furnishing to this defendant water for fire or other great necessities, free of charge, and

without regard to other possible means of securing water for such purposes.

(L) That at all times herein mentioned, the courts of the State of Idaho, and of the United States, are open and exercising both law and equity jurisdiction, and with adequate remedy to prevent forcible or unlawful or illegal trespass upon the rights and property of said Artesian Hot and Cold Water Company or of said alleged Boise Artesian Hot and Cold Water Company, but to invoke said powers to said end, they have failed and neglected to do, and elected to continue the business of furnishing water to the inhabitants of Boise City, collecting rates therefor, under authority, so to do, as a corporation organized under the laws of Idaho and authorized thereunto by an ordinance of this defendant and thereby voluntarily assumed the duty of furnishing water for fire or other great necessities to this defendant city free of charge.

(M) That this defendant city has as a governmental authority of said Boise City control over the streets of said city, and is charged, under its police power, with the health, safety, comfort and welfare of the inhabitants thereof; that by reason of the condition of the streets of said city during the period of the year when the same would be dry and dusty, the sprinkling of such streets is a great necessity to the health, comfort and welfare of the inhabitants of said city, and is peculiarly a governmental function of this defendant, exercised not in behalf of persons who are owners of lots abutting on streets, sprinkled in said city, but in behalf of the health, comfort and welfare of each and all of the inhabi-

tants thereof within the available means for such sprinkling.

SECOND CAUSE OF ACTION.

Defendant, for answer to the allegations in plaintiff's second cause of action contained, admits, denies and alleges:

1.

That it refers to and makes a part of its answer to the second cause of action the following portions of the foregoing answer and first cause of action, to wit, the title and introduction and the allegations contained in paragraphs from one to twenty-five, inclusive.

2.

Denies, on information and belief, that on the 28th day of August, 1901, or at any time, the plaintiff became or was, or ever since has been, or now is, or at any time, was, the successor of the said Artesian Hot and Cold Water Company (also called herein the Idaho Company), or took, held or has been in possession of all or any of the business, properties, rights or franchises or privileges formerly owned, held or preserved, or enjoyed by said Idaho Company; denies, on information and belief, that at any time or at all, the plaintiff was or ever has been the successor of said Idaho Company; denies, on information and belief, that, at any time since August 28, 1901, or at any time, or at all, plaintiff became such successor of said Idaho Company.

3.

Denies that at all times since August 28, 1901, or at any time, defendant has wrongfully or that at any time defendant did wrongfully maintain or enforce the pro-

visions of Ordinance No. 104, or the provisions of Ordinance No. 304, or provisions of any ordinance, or wrongfully compelled plaintiff to furnish water for street sprinkling free of charge or enforced said ordinance in any other manner than as hereinbefore in the further answer of the second cause of action specifically alleged; denies that it has wrongfully or by force taken or caused to be taken from plaintiff's waterworks or any waterworks, its said water; denies that it has wrongfully or otherwise meddled with or tampered with or changed or interfered with plaintiff's waterworks or properties, or any waterworks or properties; denies that it has continuously or at any time or in any manner or at all, by force, taken said waters for street sprinkling, or at all, by force, has taken any waters; denies that to obtain said waters or any waters, defendant took or takes possession of or uses by force or that it took or takes control of, or that it took or takes possession of, or uses by force, plaintiff's said or any stand-pipes or valves, or machinery, or water pipes forcibly; denies, on information and belief, that it has taken plaintiff's said waters or any waters of plaintiff during said time for street sprinkling purposes, or for any purposes, or that it has taken the waters of plaintiff at all; denies that defendant has wasted said waters in any manner or at all; denies that it has improperly or unskillfully taken said waters or any waters, or that it has used or handled plaintiff's or any pipes or properties, as to allow or cause water or waters to be wasted or lost, or so as to cause great or any damage to plaintiff or any damage to anyone; but alleges the fact to be that the defendant has not taken, used or had anything to do whatever with

the water or anyone or in any other manner than as hereinbefore specifically alleged in the further answer of the defendant to the first cause of action.

4.

Denies, on information and belief, that during the said time alleged in paragraph 5 of plaintiff's second cause of action, or at any time or at all, defendant has taken any of plaintiff's said water or any water of plaintiff.

5.

Denies that during said year of 1901, or at any other time, defendant, in taking said waters for sprinkling its streets, or by any taking, or in consequence of its using said waterworks or properties, or in consequence of using in any manner said waterworks or properties, or by reason of any act or acts of this defendant, it has caused any water to be wasted in any amount whatever, or has damaged or injured the plaintiff or anyone else in any sum or at all.

6.

Defendant has not sufficient knowledge, information or belief to enable it to answer the allegations in paragraph 7 of plaintiff's complaint in the second cause of action contained, and it therefore denies each and every of said allegations in said paragraph contained.

7.

Denies that the waters of plaintiff or of any other person, or any waters, were wasted or caused to be wasted by defendant; denies that said waters, or any waters, wasted or caused to be wasted, by the defendant were of the value or worth of twelve and one-half cents per

thousand gallons, or of any value, or of the total value of two thousand dollars or of any value.

8.

Denies that of the waters so taken or used by defendant, for sprinkling its streets in said year 1901, or since August, 1901, defendant took any water to the damage of plaintiff or to the damage of anyone in the sum of seven hundred and sixty dollars and fifty cents (\$760.50), or any other sum; denies that there is any liability either upon the part of this defendant city or upon the part of any private person or persons for water used for sprinkling in front of lots or at all for the sum of two thousand three hundred (\$2,300), or any sum whatsoever.

9.

Denies that the waters so taken or used by defendant for street sprinkling on the streets of said city where said Peter Sonna furnished water to the inhabitants thereof, at any place, or at all, were taken to plaintiff's or anyone's great damage, or any damage, to anyone in the sum of nine hundred dollars (\$900.00), or in any sum whatever. Defendant further answering plaintiff's second cause of action, alleges:

(A) That if said Boise Artesian Hot and Cold Water Company is a corporation as alleged in the complaint, and empowered to do business in the State of Idaho, then it is formed for the purpose of carrying on the business of furnishing water to cities and towns in Idaho, and is charged with all the duties, liabilities and obligations devolving upon a corporation formed for like purpose under the general laws of the State of Idaho, and is charged with the duty and obligation to furnish

to this defendant to the extent of its means water for fire or other great necessities, free of charge.

10.

The defendant, for further answer to the plaintiff's second cause of action, refers to and makes a part of the answer to this cause of action the further answer to the plaintiff's first cause of action, from paragraphs A to M, inclusive.

11.

The defendant further answering herein, says; that plaintiff should not further have or maintain this suit against the defendant, and says: that the alleged cause of action set forth in plaintiff's complaint accrued, if at all, by reason of dealings had by and between this defendant city and the Artesian Hot and Cold Water Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho; that, as such, between March ———, 1891, and January 28, 1902, a period of over ten years, it has been engaged in furnishing water to the inhabitants of this city for family use and to this defendant for fire and other great necessities, and defendant says; that the decision, resolution and determination of said Artesian Hot and Cold Water Company, to go out of business, and to undertake to make plaintiff its successor in its said business, and to all its rights, properties, privileges, franchises, claims and contracts was fraudulent and collusive, and that for the purpose of fraudulently imposing on the jurisdiction of this Court, said Artesian Hot and Cold Water Company did attempt to organize, form and create, under the laws of West Virginia, a corporation out of its own members,

stockholders and officers, to whom it has fraudulently and collusively pretended to turn over, transfer and assign and convey all its properties, business, claims, demands, accounts, rights, privileges, franchises, works and all pertaining thereto, and all claims, rights, contracts connected therewith, and all liens, damages and claims due or owing or claimed to be due or owing to it arising from contract or from torts or trespass or from noncontract sources, including its said pretended claim and every claim against this defendant, and all without any consideration whatever passing to the said Artesian Hot and Cold Water Company therefor, and wholly for the purpose of enabling this plaintiff to institute this suit in the United States Court, all being done long after the right of action, if any exist, had accrued, and said defendant says that said Boise Artesian Hot and Cold Water Company is composed of the same persons, stockholders and members, and organized alone for the purpose of giving jurisdiction to this court.

12.

The defendant further answering, says, that the plaintiff should not maintain said suit herein for the reason that more than sixty days have elapsed since the date upon which it is alleged and claimed in plaintiff's complaint, that said Artesian Hot and Cold Water Company turned over and transferred, assigned and conveyed to plaintiff all its properties, business and claims, and its said claims and all claims alleged against this defendant, and that the plaintiff has, at all times, failed and refused, and continues to fail and refuse to file a certified copy of its Articles of Incorporation in the office of the

county recorder of Ada County, in which the property in question is situated.

Wherefore, defendant prays that the plaintiff take nothing by this cause of action; that said action be dismissed, it having been brought contrary to law and without right or claim; for costs and disbursements herein, and for all proper relief.

JOHN J. BLAKE,
C. S. KINGSLEY and
W. E. BORAH,
Attorneys for Defendant.

State of Idaho, }
County of Ada. } ss.

M. Alexander, being duly sworn, deposes and says: that he has read the above and foregoing answer; knows the contents thereof, and that the facts therein stated are true, of his own knowledge, except as to matters therein stated to be on information and belief, and as to those matters, he believes it to be true; that he is the duly elected, qualified and acting Mayor of the above-named defendant, and as such verifies this answer.

M. ALEXANDER.

Subscribed and sworn to before me, this 8th day of March, 1902.

[Seal]

H. W. DUNTON,
Notary Public.

I, John J. Blake, of counsel for the defendant, hereby certify that the foregoing answer to the complaint is, in my opinion, well founded in law.

JOHN J. BLAKE.

Exhibit "A."

ORDINANCE No. 304.

An ordinance granting authority to the Artesian Hot and Cold Water Company, a corporation organized and existing under and by virtue of the laws of the State of Idaho, to furnish and supply water to Boise City, and the inhabitants thereof, to lay and maintain the pipes of said company in the streets and highways, to operate, carry on and conduct the waterworks and business of said company in said city, and demanding of said company to furnish water free of charge to the full extent of their means to said Boise City for fire purposes, and the sprinkling of the streets of said city.

Whereas, Boise City is a municipal corporation organized and existing under and by virtue of the laws of the State of Idaho; and,

Whereas, the Artesian Hot and Cold Water Company is a private corporation, organized, existing and operating under the laws of said State of Idaho, and has been existing and operating as such corporation for a period of more than seven years; and,

Whereas, said Boise City is greatly in need of water to be used for fire purposes and sprinkling of the streets in said city;

Now, therefore, the Mayor and Common Council of Boise City, Idaho, do ordain:

Sec. 1. That the Artesian Hot and Cold Water Company, a corporation, organized and existing under and by virtue of the laws of the State of Idaho and the ordinances of said Boise City, is hereby granted by said Boise City authority and permission to lay and main-

tain the pipes of said company in the streets of said city, to operate, carry on and conduct the business of said company in said city, and to supply water to said city and the inhabitants in the manner and according to the laws of Idaho.

Sec. 2. That demand is hereby made by said Boise City of and from said Artesian Hot and Cold Water Company to furnish free of charge sufficient water to the full extent of the means of said company, for fire purposes and for sprinkling of the streets in said Boise City.

Sec. 3. That the privilege and authority granted by this ordinance shall continue for the same term provided for in the franchise heretofore granted by said city to the predecessors of the said Artesian Hot and Cold Water Company.

Sec. 4. This ordinance shall take effect and be in force from and after its passage and approval.

Passed the Common Council of Boise City, Idaho, this 19th day of April, 1900.

Approved by the Mayor of Boise City, Idaho, this 19th day of April, 1900.

J. H. RICHARDS,
Mayor.

Attest: H. I. McELFRESH,
City Clerk.

Exhibit "B."

NOTICE.

To the Artesian Hot and Cold Water Company, a Corporation, Doing Business in Boise City, Idaho:

Gentlemen: You and each of you are hereby notified that Boise City, a municipal corporation of the State

of Idaho, in accordance with ordinance number 304, approved April 19th, 1900, of said Boise City, and the laws of Idaho, hereby makes demand of and from the said Artesian Hot and Cold Water Company to furnish free of charge to said Boise City sufficient water to the full extent of the means of said company for city fire purposes and for sprinkling of the streets in said Boise City, Idaho.

That a copy of said ordinance number 304 is hereby annexed and made a part of this notice.

This notice is given by order of the Council and Mayor pro tem of Boise City, Idaho.

Dated at Boise City, Idaho, April 19th, 1900.

H. N. COFFIN,

Mayor pro tem of Boise City, Idaho.

Attest: H. I. McELFRESH,

City Clerk of Boise City, Idaho.

[Endorsed]: No. 199. United States Circuit Court, Central Division, District of Idaho. Boise Artesian Hot and Cold Water Company vs. Boise City. Answer. Filed March 8th, 1902. A. L. Richardson, Clerk.

Journal Entries.

At a stated term of the Circuit Court of the United States for the Central Division of the District of Idaho, held at Boise in said District on Tuesday, the 6th day of May, A. D. 1902. Present: Honorable HIRAM KNOWLES, Judge.

BOISE ARTESIAN HOT AND COLD
WATER COMPANY, Limited,
vs.
BOISE CITY. } No. 199.

Trial.

Now, on this day this cause came regularly on to be heard and tried before the court and jury. Messrs. Kingsbury & Kingsbury, and A. A. Fraser, Esqr., appearing as counsel for plaintiff, and John J. Blake, W. E. Borah and C. S. Kingsley, Esqrs., on behalf of defendant.

Agreement Waiving Objection to Jury.

It was agreed in open court by counsel for the respective parties, that no objection would be made to the panel of said jury, upon the ground that said jurors were summoned as a special jury upon an open venire issued to the marshal.

Order Giving Time to File Bill of Exceptions.

It is further agreed and ordered that either party have sixty days from the date of the close of said cause in which to file and serve statement and bill of exceptions in said cause.

Thursday, May 8, 1902.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, Limited, vs. BOISE CITY.	}	No. 199.
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Trial Concluded and Order that Bill of Exceptions May be Settled in Montana.

The trial of this cause adjourned on yesterday for further hearing was this day resumed. Jury called and found to be present and the respective attorneys being in court. The examination of B. S. Howe as a witness for plaintiff was resumed, and during whose examination in chief, the said plaintiff upon the ruling of the Court upon objection to the introduction of testimony, rested its case. The defense introduced documentary evidence and rest here.

Thereupon the said jury, under the instructions of the Court, returned the following verdict:

“United States Circuit Court, Central Division, District of Idaho.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, Limited, vs. BOISE CITY.	}
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Verdict.

We, the jury in the above-entitled cause, find for the defendant under the instructions of the Court.

E. MASTERS,
Foreman.”

Which verdict was recorded by the clerk and read to the jury, who confirmed the same; thereupon, the Court discharged said jury from the further consideration of said cause, and ordered that judgment be entered in accordance with said verdict.

It was agreed in open court by counsel for the respective parties, that the bill of exceptions in said cause, may be settled and signed in Montana, with the same force and effect as if signed in Idaho.

In the Circuit Court of the United States, for the District of Idaho, Central Division.

BOISE ARTESIAN HOT AND COLD
WATER COMPANY, Limited (a
Corporation),

Plaintiff,

vs.

BOISE CITY,

Defendant.

Motion to Strike Out.

Comes now the plaintiff and makes severally the following motions:

I.

That of paragraph 26 of defendant's answer to the first cause of action, that portion of the same designated as Subdivision "(A)" be stricken out, as irrelevant and immaterial and not constituting any ground of defense.

II.

Plaintiff also moves to strike out that portion and subdivision of said paragraph 26, marked Subdivision

“(B),” on the ground that the same is irrelevant, immaterial, and not constituting any ground of defense.

III.

Plaintiff also moves to strike out that portion and subdivision of said paragraph 26, marked Subdivision “(C),” as irrelevant and immaterial, and not constituting any ground of defense.

IV.

Plaintiff also moves as a separate motion to strike out that portion of said paragraph 26 of defendant’s answer, marked Subdivision “(D),” on the ground that the same is irrelevant, immaterial, and that the matters stated therein do not constitute a ground of defense.

V.

Plaintiff also moves to strike out that portion and subdivision of said paragraph 26 of defendant’s answer, marked and designated Subdivision “(E),” for the reason that the same is irrelevant, immaterial, and does not constitute any ground of defense.

VI.

Plaintiff also moves to strike out that portion and subdivision of said paragraph 26 of defendant’s answer, marked and designated as Subdivision “(F),” for the reason that the same is irrelevant and immaterial, and does not constitute any ground of defense.

VII.

Plaintiff also moves to strike out that portion and subdivision of paragraph 26 of defendant’s answer, marked and designated Subdivision “(G),” for the rea-

son that the same is irrelevant, immaterial, and that the facts stated therein do not constitute any ground of defense.

VIII.

Plaintiff also moves to strike out that portion and subdivision of said paragraph 26 of defendant's answer, marked and designated Subdivision "(H)," as irrelevant, immaterial, and not constituting any ground of defense.

IX.

Plaintiff also moves to strike out that portion of said paragraph 26 of defendant's answer, marked and designated Subdivision "(I)," as irrelevant, immaterial, and not constituting any ground of defense.

X.

Plaintiff also moves to strike out that portion and subdivision of said paragraph 26 of defendant's answer, marked and designated as Subdivision "(J)," as irrelevant, immaterial, and not constituting any ground of defense.

XI.

Plaintiff also moves to strike out that portion and subdivision of said paragraph 26 of defendant's answer, marked and designated Subdivision "(K)," as irrelevant, immaterial, and not constituting any ground of defense.

XII.

Plaintiff also moves to strike out that portion of said paragraph 26 of defendant's answer marked and designated Subdivision "(L)," for the reason that the same is irrelevant, immaterial, and that the matters therein stated do not constitute any ground of defense.

XIII.

Plaintiff also moves to strike out that portion and subdivision of said paragraph 26 of defendant's answer, marked and designated as Subdivision "(M)," for the reason that the same is irrelevant, immaterial, and that the matters therein stated do not constitute any ground of defense.

XIV.

And as a further and separate motion, plaintiff moves to strike out all of said paragraph 26 of defendant's answer on the ground that the same is irrelevant, immaterial, and that the matters therein stated do not constitute any ground of defense.

XV.

Plaintiff also moves as a separate and distinct motion to strike out that portion of the defendant's answer to the second cause of action, marked and designated as Subdivision "(A)," of the 9th allegation of said answer, to the second cause of action, on the ground that the same is irrelevant, immaterial, and that the matters therein stated do not constitute any ground of defense.

XVI.

Plaintiff also moves to strike out that portion of defendant's answer to plaintiff's second cause of action, marked and designated as paragraph "(10)," on the ground that the same is irrelevant and immaterial, and that the matters therein stated do not constitute any grounds of defense.

XVII.

Plaintiff also moves as a further and separate and distinct motion to strike out that portion of defendant's

answer to plaintiff's second cause of action, marked and designated as paragraph "(11)," on the ground that the same is irrelevant, immaterial, and that the matters therein stated do not constitute any grounds of defense.

XVIII.

Plaintiff also moves as a separate and distinct motion to strike out that portion of defendant's answer to plaintiff's second cause of action, marked and designated as paragraph "(12)," on the ground that the same is irrelevant, immaterial, and that the matters therein stated do not constitute any grounds of defense.

KINGSBURY & KINGSBURY and
ALFRED A. FRASER,

Attorneys for Plaintiff.

[Endorsed]: No. 199. In the Circuit Court of United States, District of Idaho. Boise A. H. & C. W. Co., Plaintiff, vs. Boise City, Defendant. Filed May 6, 1902. A. L. Richardson, Clerk. Kingsbury & Kingsbury, Attorneys for Plaintiff.

United States Circuit Court, Central Division, District of Idaho.

BOISE ARTESIAN HOT AND COLD
WATER CO., Limited,
vs.
BOISE CITY.

Verdict.

We, the jury in the above-entitled cause, find for the defendant under the instructions of the Court.

C. MARSTERS,
Foreman.

[Endorsed]: No. 199. United States Circuit Court, Central Division, District of Idaho. Boise Artesian Hot and Cold Water Company vs. Boise City. Verdict. Filed May 8th, 1902. A. L. Richardson, Clerk.

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In the United States Circuit Court, Central Division, District of Idaho.

BOISE ARTESIAN HOT AND COLD WATER CO., Limited,	Plaintiff	}
vs.		
BOISE CITY,	Defendant.	

Judgment.

This action came on regularly for trial on the 6th day of May, 1902. The plaintiff appearing by its counsel, Messrs. Kingsbury & Kingsbury and A. A. Fraser, Esq., and the defendant by its counsel, W. E. Borah, J. J. Blake, and Charles S. Kingsley, Esqrs. A jury of twelve persons was regularly impaneled and sworn to try said action; a witness was sworn and examined on behalf of plaintiff, and documentary evidence introduced on behalf of both plaintiff and defendant; thereupon the Court instructed the jury to return a verdict for defendant, and the said jury, without leaving the jury-box, returned the following verdict:

“United States Circuit Court, Central Division, District of Idaho.

BOISE ARTESIAN HOT AND COLD
WATER CO., Limited,
vs.
BOISE CITY.

Verdict.

We, the jury in the above-entitled cause, find for the defendant under the instructions of the Court.

E. MARSTERS,
Foreman.”

Wherefore, by virtue of the law and by reason of the premises aforesaid, it is ordered and adjudged that plaintiff take nothing by its complaint herein, and that said defendant Boise City, do have and recover of and from the Boise Artesian Hot and Cold Water Company, Limited, the said plaintiff, its costs and disbursements herein expended, amounting to the sum of thirty-five and 74-100 dollars.

Dated May 8, 1902.

A. L. RICHARDSON,
Clerk.

[Endorsed]: No. 199. United States Circuit Court, Central Division, District of Idaho. Boise Artesian Hot and Cold Water Company, Limited, vs. Boise City. Judgment. Filed May 8th, 1902. A. L. Richardson, Clerk.

*United States Circuit Court, Central Division, District of
Idaho.*

BOISE ARTESIAN HOT AND COLD	}
WATER CO., Limited,	
vs.	
BOISE CITY.	}

Clerk's Certificate to Judgment-Roll.

I, the undersigned clerk of the United States Circuit Court of the United States, for the District of Idaho, do hereby certify that the foregoing papers hereto annexed constitute the judgment-roll in the above-entitled action.

Witness my hand and the seal of said court this 8th day of May, 1902.

[Seal]

A. L. RICHARDSON,
Clerk.

[Endorsed]: In the Circuit Court of the United States for the District of Idaho, Central Division. Judgment-Roll. No. 199. Boise Artesian Hot and Cold Water Company vs. Boise City. Register No. 1. Filed May 8th, 1902. A. L. Richardson, Clerk.

*In the Circuit Court of the United States, Central Division,
District of Idaho.*

BOISE ARTESIAN HOT AND COLD
WATER COMPANY,

Plaintiff,

vs.

THE CITY OF BOISE,

Defendant.

Bill of Exceptions.

Be it remembered that on the 6th day May, 1902, this cause came on for trial in said Court before Honorable H. Knowles, the Judge presiding and a jury. Kingsbury & Kingsbury and Alfred A. Fraser, appearing as counsel for the plaintiff, and W. E. Borah, J. J. Blake and Chas. S. Kingsley, appearing as counsel for the defendant. Whereupon the following proceedings were had, to wit:

Plaintiff offers in evidence the Certificate of Incorporation of the Plaintiff Company, the same is admitted in evidence and read to the jury, and marked Plaintiff's Exhibit "A"; a copy of which is hereto attached and made a part of this bill of exceptions.

Plaintiff offers in evidence a deed purporting to convey certain property and franchises of the Artesian Hot and Cold Water Company to the Boise Artesian Hot and Cold Water Company; said deed is admitted in evidence, read to the jury and marked Plaintiff's Exhibit "B," a copy of which said exhibit is hereto attached and made a part of this bill of exceptions.

Plaintiff now offers in evidence document purporting to transfer certain property, rights of action, debts and other matters from the Artesian Hot and Cold Water Company to the Boise Artesian Hot and Cold Water Company; the same is admitted in evidence, read to the jury, and marked Plaintiff's Exhibit "C," a copy of which said exhibit is hereto attached and made a part of this bill of exceptions. It is here admitted by the defendant that the plaintiff incorporation, has filed with Secretary of State, and with the clerk and recorder of Ada County, a paper designating his proper office and place of business in Idaho, as Boise City, Ada County, and appointing and designating B. S. Howe its agent, upon whom service of process can be made in compliance with the laws and constitution.

B. S. HOWE, called, sworn and examined, testified as follows; I am sixty years of age; I reside in Boise City. I am secretary of the Boise Artesian Hot and Cold Water Company. I have been secretary of the Artesian Hot and Cold Water Company. Am secretary of the plaintiff company since its organization about two years ago. The plaintiff company commenced business on the evening of the 28th of August, 1901—a general water business, distributing and selling water to the people here in Boise City. The plaintiff company has had dealings with Boise City; the plaintiff company has been furnishing water to the people of Boise City since the 28th of August, 1901. The company has rendered bills to the city for water supplied to the city, and the city paid them. I was secretary of the old company, called the Idaho Company; that company ceased to do business at the close of business on the 28th of August, 1901. My

duties as secretary were the same in both companies; next to Mr. Eastman, the management came to me. Mr. Eastman is the general manager, but next to him I performed the duties, consisting of the general supervision of the works throughout the city by our pipe men, and managing and taking charge of the Natatorium and pump station, and, in a general way, overlooking the whole system, including the reservoirs, wells, etc., I am well acquainted with the properties of this company. The waters of the company are developed by artesian wells. We have flowing and abandoned wells, all told, twenty-nine, all but one artesian wells; eight or nine of them have ceased to flow: Three of the wells are hot water wells, which are situated some distance from the cold water wells. I have charge of the collecting and rendering of the bills of the company, etc. I know what claim the first cause of action set forth in the complaint is for; nothing has been paid on it; I also know in regard to the claim set forth in the second cause of action in the complaint.

Q. Has anything been paid for water taken for sprinkling purposes by the city that was taken since August 28th, 1901?

(Objected to by the defendant for the reason that it is irrelevant and immaterial, for the reason that if it was taken for sprinkling purposes, there could be no charge made for it by the plaintiff.)

The COURT.—The objection in this matter will be sustained; to which ruling of the Court counsel for plaintiff excepts, and which exception was then and there by the Court allowed.

I know the method by which the city has taken water

during the times mentioned in the complaint from the waterworks company; it was taken by attaching stand-pipes to the fire hydrant partly, and partly by opening our valves and taking it from our stand-pipes. The company never gave them permission to take the water and the company always objected to it. There was a notice served upon the city sometime about the 21st of November, 1901; there has been several notices served upon the city by the company in regard to this matter. (Plaintiff offers in evidence notice served on the city objecting to the taking of water by city for sprinkling purposes. Paper admitted in evidence, read to the jury and marked Plaintiff's Exhibit "D," a copy of which exhibit is hereto attached and made a part of this bill of exceptions.) This paper, exhibit "D," is one of the notices. (Plaintiff offers to introduce in evidence paper, being notice to the defendant, not to take water from the company's waterworks system for the purpose of sprinkling the streets; same is admitted in evidence, read to the jury and marked Plaintiff's Exhibit "E," a copy of which exhibit is hereto attached and made a part of this bill of exceptions.) After the plaintiff company was formed, or rather, after it purchased the properties about the 28th of August, an advertisement was put in all the papers of Boise, a notice signed by each company, the one going out and the one coming in. I have a copy of the paper. (Papers offered in evidence, admitted and read to the jury and marked Plaintiff's Exhibit "F" and "G"; copies of each said exhibits are hereto attached and made a part of this bill of exceptions.) Copies of exhibits "F" and "G" were published in all four papers of Boise City on the 29th and 30th of August, 1901, at the

time the new company took the property and commenced business, I remember of serving upon the mayor of the city, immediately after receiving notice, of the passage of the ordinance 304, the purport of which was, that the company refused to accept the ordinance; that it did not need the pretended grant or franchise it contained, and that it considered the same as illegal and void, or of similar purport.

As to the ability and power of furnishing water by the Artesian Hot and Cold Water Company, during the year 1901, our gravity supplies was 104,000,000 gallons a year, and all the rest we had to pump; all that was furnished beyond that amount had to be pumped from wells. Our gravity flow was sufficient outside of lawn sprinkling in summer, to furnish out customers for domestic purposes; taking in the lawn, it was not sufficient during the summer months. Provided no water had been used for sprinkling in the summer months of 1901, it would have required on an average, 400,000 gallons a day to be pumped. On account of the water taken by the city for sprinkling purposes it would make a difference of about five hours a day of pumping during the sprinkling season. In 1900, I can't exactly tell, but it required about ten per cent less extra pumping for sprinkling during that season. All the cold water that was used for sprinkling the streets was obtained by pumping. The power that runs our pump is steam-power; we use coal for fuel. It took about five hours more pumping last year every day to supply the water that was used for sprinkling the streets. The cost of the water system of the company up to the present time has been about \$335,000 or \$340,000. The absolute cost

of the cold water system, including real-estate, tools, etc., was about \$212,000, or \$240,000.

Q. I will ask you, if, during the time alleged in the complaint, in which it is alleged that the defendant took this water, if the cold water system was paying dividends or producing a profit?

(Objected to by counsel for the defendant as incompetent, irrelevant and immaterial, for the reason that it would be simply a question of fixing the rates under the statutes as to whether it was paying or not, which objection was sustained by the Court; to which action of the Court plaintiff excepted, which exception was by the Court at the time allowed.)

Plaintiff rests.

Defendant offered in evidence the articles of incorporation of the Artesian Hot and Cold Water Company, and the same were admitted in evidence and read to the jury and marked Defendant's Exhibit No. "1," and made a part of this bill of exceptions.

The Court, of its own motion, instructed the jury as follows:

Gentlemen of the Jury: You will elect one of your number to act as foreman of the jury, and you will find a verdict for the defendant; to which action of the Court, counsel for the plaintiff excepted on the ground that the instruction was against the law and the evidence, and not proper under the evidence and the admissions of the pleadings (which exception was by the Court then and there allowed).

Case closed.

Thereafter, to wit, May 8th, 1902, judgment was regularly entered herein in favor of the defendant for costs of suit and against the plaintiff (to which judgment the plaintiff duly excepted).

The foregoing together with the exhibits therein mentioned and hereto attached constitutes and contains the evidence, and all the evidence, given at the trial of this action.

By stipulation of counsel, and by order of the Court duly made and entered at the trial, it was agreed and ordered that the bill of exceptions might be settled in the State of Montana, and sixty days' extra time was given by agreement of counsel and by order of the Court in which to prepare and serve bill of exceptions.

Plaintiff's Exhibit "A."

STATE OF WEST VIRGINIA.

CERTIFICATE OF INCORPORATION.

I, Wm. M. O. Dawson, Secretary of the State of West Virginia, do hereby certify that an agreement duly acknowledged and accompanied by the proper affidavits, has been this day delivered to me, which agreement is in the words and figures following:

The undersigned agree to become a corporation by the name of

“BOISE ARTESIAN HOT AND COLD WATER COMPANY”

for the purpose of acquiring, developing and holding springs, wells and streams of both hot and cold water and conducting the waters thereof to reservoirs and to Boise City and to the vicinity of Boise City in Ada

County, State of Idaho, for the use of said city and the inhabitants thereof, and the inhabitants of Ada County, in and in the vicinity of said city; of furnishing waters for municipal, for county, for State, for fire, for sanitary, for baths, for domestic, for heating, for mechanical, and for other useful and beneficial purposes; of supplying the same to the inhabitants of Ada County, State of Idaho, in the vicinity of Boise City, and to the inhabitants of Boise City, and to said city, county and State for such and other purposes; of furnishing steam and water for heating, for motive power, and for mechanical and other useful purposes; of erecting, constructing, holding, using, managing and maintaining sanitariums and natoriums, hotels, baths, bath-houses and all other necessary or convenient buildings, at and near said Boise City; of developing, erecting, constructing, operating, holding, using, managing and maintaining artesian wells, reservoirs, pipe lines and tramways; also of acquiring, holding, using, selling and transferring real estate and all such rights of way, franchises, waters, artesian wells, reservoirs, pipe lines, water rights, water-powers, machinery, appliances and other rights and properties as may be necessary, suitable or convenient in successfully conducting the business of the corporation. Of charging, collecting, and receiving tolls, rents and rates for all services performed or benefits rendered; of taking, purchasing, acquiring, holding, operating and maintaining the rights and properties of water companies, associations or corporations and of acquiring, using owning and operating all the properties, franchises, rights claims, privileges and everything pertaining to that certain corporation of the State of Idaho, known as "The

Artesian Hot and Cold Water Company, Limited," and to be the successor in every respect of said corporation.

Which corporation shall keep its principal office or place of business at the city of Boise, in Ada County, State of Idaho, and is to expire on the first day of September, A. D. 1950. And for the purpose of forming the said corporation, we have subscribed the sum of fifty-five thousand seven hundred dollars to the capital thereof, and have paid in on said subscription, the sum of five thousand five hundred and seventy dollars; and desire the privilege of increasing the said capital, by the sale of additional shares from time to time to two hundred and fifty thousand dollars in all.

The capital so subscribed is divided into shares of one hundred dollars each, which are held by the undersigned respectively, as follows, that is to say:

Names.	Residence.	No. of shares.
Hosea B. Eastman,	Boise City, Idaho.	230
C. W. Moore,	Boise City, Idaho.	105
Charles Himrod,	Boise City, Idaho.	27
J. W. Cunningham,	Boise City, Idaho.	50
Alfred Eoff,	Boise City, Idaho.	145

And the capital to be hereafter sold is to be divided into shares of like amount.

Given under our hands this 27th day of August, A. D. 1900.

H. B. EASTMAN.

C. W. MOORE.

CHARLES HIMROD.

ALFRED EOFF.

J. W. CUNNINGHAM.

Wherefore, the corporators named in the said agreement and who have signed the same, and their successors and assigns, are hereby declared to be from this date until the first day of September, nineteen hundred and fifty, a corporation by the name and for the purpose set forth in said agreement.

Given under my hand and the Great Seal of said State, at the city of Charleston, this first day of September, nineteen hundred.

[Seal]

WM. M. O. DAWSON.

Secretary of State.

Plaintiff's Exhibit "B."

This indenture, made this 28th day of August, A. D. 1901, by and between the Artesian Hot and Cold Water Company, Limited, a corporation duly organized and existing under the laws of the State of Idaho, whose principal place of business is in the city of Boise, Ada County, Idaho, party of the first part, and the Boise Artesian Hot and Cold Water Company, Limited, a corporation duly organized and existing under and by virtue of the laws of the State of West Virginia, whose principal place of business is in the city of Boise City, Ada County, Idaho; and whereas, both the stockholders, at a meeting duly called and assembled, and the Board of Directors of said Artesian Hot and Cold Water Company, Limited, duly assembled, duly passed the necessary resolutions empowering the execution of this deed on the part of the said company by the president and secretary of said company; and whereas, C. W. Moore is the president of said Artesian Hot and Cold Water Company, Limited, and B. S. Howe is the secretary of said com-

pany; and whereas, the party of the second part, the said Boise Artesian Hot and Cold Water Company, Limited, both by its stockholders duly called and assembled and by its Board of Directors duly assembled, passed the necessary resolution empowering the officers of said company to enter into the necessary contracts for purchasing the properties mentioned herein:

Now, therefore, in pursuance of said resolutions of said stockholders and of said Board of Directors of said Artesian Hot and Cold Water Company, Limited, aforesaid, and in consideration of the performance on the part of the party of the second part of all the necessary requirements of said resolutions on its part required, and of one dollar in hand paid, the receipt of which and all of which consideration is hereby acknowledged, the said party of the first part doth by these presents grant, bargain, sell, assign, convey, confirm, transfer, remise, release and deed unto the said party of the second part, its successors and assigns forever, all its right, title, interest, claim and demand whatsoever, in law or equity, of, in or to, the following rights, lands, privileges and properties, to wit:

The following described real estate and properties in Ada County, State of Idaho, to wit: The northeast quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) of section thirty-five (35), town. four (4) north, range two (2) east, Boise Meridian; also the northeast half ($\frac{1}{2}$) of the southeast quarter ($\frac{1}{4}$) of section thirty-four (34) and the northwest quarter ($\frac{1}{4}$) of the southwest quarter ($\frac{1}{4}$) and the southwest quarter ($\frac{1}{4}$) of the northwest quarter ($\frac{1}{4}$) of section thirty-five (35), town. four (4) north, range two (2) east, Boise Meridian; also the southeast quarter ($\frac{1}{4}$) of the northwest quarter

($\frac{1}{4}$) and the south half ($\frac{1}{2}$) of the northeast quarter ($\frac{1}{4}$) of section thirty-five (35), town. four (4) north, range two (2) east, Boise Meridian; also the following parcel of land situate on the Warm Springs Avenue in said Ada County, to wit: Beginning on the south side of the public road leading from Boise City to the Warm Springs and known as the Warm Springs road, at a point on the section line between sections thirteen (13) and fourteen (14), in town. three (3) north, range two (2) east, Boise Meridian, and running thence easterly along the south side of said road one hundred and twenty (120) feet, thence at right angles in a southwesterly direction to the same section line; thence north to the place of beginning; also the southeast quarter ($\frac{1}{4}$) of the southeast quarter ($\frac{1}{4}$) of the southwest quarter ($\frac{1}{4}$) of section twelve (12), town. three (3) north, range two (2) east, Boise Meridian, containing ten acres of land; also that piece of land bounded as follows: Commencing at a point in the center of the Warm Springs road, leading from Boise City to the Warm Springs, at the southeast corner of I. N. Coston's land, which point is situate seven (7) chains and fifty (50) links south of the southeast corner of section eleven (11), town. three (3) north, range two (2) east, Boise Meridian; and running thence south thirteen (13) and forty-six hundredths (46-100) chains; thence west three (3) and sixty-one-hundredths (60-100) chains; thence north four (4) and twenty-eight one-hundredths (28-100) chains to the water ditch known as the Jacobs Mill Ditch; thence north seventy-two (72) degrees west, along said ditch four (4) and sixty eight one-hundredths (68-100) chains to the center of the headgate in said ditch; thence north eleven (11) degrees west six

(6) and fifty one-hundredths (50-100) chains to a post; thence north forty-two (42) degrees and thirty (30) minutes east two (2) and fifty one-hundredths (50-100) chains; thence north thirty (30) degrees and thirty-six (36) minutes east five (5) and ninety-eight one-hundredths (98-100) chains to the center of the Warm Springs Road; thence south fifty-nine (59) degrees and twenty-four (24) minutes east four (4) and eighty-seven one-hundredths (87-100) chains to the place of beginning, containing nine (9) and seven one-hundredths (7-100) acres of land, more or less, in section fourteen (14), town. three (3) north, range two (2) east, Boise Meridian; also that certain right of way through, along and under the lands of Robert B. Wilson, for water pipes of the Artesian Hot and Cold Water Company, Limited, and more particularly described as follows, to wit: Beginning at a point located as follows, running from a point north fifty-four (54) degrees and seven (7) minutes west from the north quarter-section corner of section thirteen (13), town. three (3) north, range two (2) east, Boise Meridian, two hundred and forty-nine (249) and seven-tenths (7-10) feet distant, which point is situate one hundred and seventy-three (173) and five-tenths (5-10) feet from the westerly artesian hot water well of the Artesian Hot and Cold Water Company, Limited; and running thence south seventy-two (72) degrees and ten (10) minutes west, twelve hundred (1200) feet to said point of beginning of said right of way situate on that east line of the land of the said Robert B. Wilson, and from said point of beginning running south seventy-two (72) degrees and ten (10) minutes west fourteen hundred and eleven (1411) feet to the west line of the land of the said Wilson at

a point one hundred and ninety-six (196) feet south of the south side of the public road leading from Boise City up the Boise River to the Warm Springs, and known as the Warm Springs road, situate in Ada County, State of Idaho, with full and free right and liberty for the said Artesian Hot and Cold Water Company, its successors and assigns, and its and their agents and servants, to dig and upon said right and place, lay and put its and their water pipes therein and thereupon and remove, replace and repair the same with ingress and egress therefor, and the right to go, return, pass and repass with the necessary horses, carts, wagons and tools through, along and over said right of way from time to time and at all times hereafter in laying, removing, replacing and repairing said water pipes, granted and conveyed to the said Artesian Hot and Cold Water Company, Limited, by a warranty deed dated May 16th, 1891, given by Robert B. Wilson and Louisa B. Wilson, his wife, and recorded in book 18 of Deeds, at page 45, of the records of said Ada County; also lots five (5) and six (6) in block one hundred and seven (107) as same are designated on official plat of Boise City; also that piece or parcel of land in said Ada County, commencing at a point south thirteen hundred and eighty-three (1383) and thirty-six one-hundredths (36-100) feet, and west two hundred and thirty-seven (237) and six-tenths (6-10) feet from the corner to sections eleven (11), twelve (12), thirteen (13) and fourteen (14), town. three (3) north, range two (2) east, Boise Meridian; thence west six hundred and forty-four (644) and two-tenths (2-10) feet; thence, north thirty degrees and thirty-six (36) minutes east six hundred and thirty-six (636) and five-tenths (5-10)

feet; thence south eleven (11) degrees east one hundred and fifty (150) feet; thence south seventy-two (72) degrees east three hundred and twenty (320) feet; thence south three hundred (300) feet to place of beginning in the northeast quarter ($\frac{1}{4}$) of section fourteen (14), town. three (3) north, range two (2) east, Boise Meridian; also all hot and cold water pipes and pipe lines and all connected therewith belonging to the party of the first part; also that certain grant and franchise and all rights and privileges pertaining thereto, which was by ordinance of Boise City granted to H. B. Eastman and B. M. Eastman, and all pertaining to the waterworks once owned by said Eastmans; also that certain water right and the waters flowing from three (3) artesian wells and to each and every of said wells to the extent of four and two hundred and seventy-three one-thousandths cubic feet per second of time, which said wells through and by means of which said water is diverted and appropriated and situated in the southeast quarter of the southeast quarter of the southwest quarter of section twelve (12), town. three (3) north, range two (2) east, of the Boise Meridian, in Ada County, State of Idaho, located by party of first part November 23d, 1899, and notice of location filed in office of recorder of Ada County on November 24th, 1899, and recorded in book 2 of Water Rights, at page 583; also that certain water right and the waters flowing from three artesian wells and each and every of said wells to the extent of four and two hundred and seventy-three one-thousandths cubic feet per second of time, which said wells through and by means of which said water is diverted and appropriated, are situated in the southeast quarter ($\frac{1}{4}$) of the south-

east quarter ($\frac{1}{4}$) of the southwest quarter ($\frac{1}{4}$) of section twelve (12), town. three (3) north, range two (2), east of Boise Meridian, in Ada County, State of Idaho, which said water right and waters were on the 24th day of November, 1899, located by the party of the first part, and notices of which location was filed for record in the office of the recorder of Ada County, on the 25th day of November, 1899, and recorded in book two, of water rights in said office at page 584; together with all and singular the tenements, hereditaments, rights, privileges and appurtenances thereunto belonging, or in any way appertaining, and the revision or revisions, remainder or remainders, rents, issues, benefits, rates and profits thereof.

To have and to hold, all and singular, the said premises, rights, privileges, together with the appurtenances, unto the said party of the second part, its successors and assigns forever.

In witness whereof, the said party of the first part, by resolution of its Board of Directors, hath caused these presents to be subscribed by its president and secretary, and its corporate name and seal to be hereunto affixed, the day and year first above written.

ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,

[Seals]

By C. W. MOORE,
President, and
B. S. HOWE,
Secretary.

(\$10.)

(I. R. Stamps) (\$10. I. R. S.)

(\$10. I. R. S.) (\$10. I. R. S.) (\$10. I. R. S.) (\$10. I. R. S.)

(\$10. I. R. S.) (\$5. I. R. S.)

State of Idaho, }
County of Ada. } ss.

On this 28th day of August, 1901, before me, W. S. Bruce, a notary public in and for Ada County, personally appeared C. W. Moore, personally known to me to be the president of the Artesian Hot and Cold Water Company, Limited, the corporation that executed the within instrument, and acknowledged to me that such corporation executed the same.

In witness whereof, I have hereunto set my hand and affixed my official seal, the day and year in this certificate first above written.

[Seal]

W. S. BRUCE,
Notary Public.

Plaintiff's Exhibit "C."

Know all men by these presents, that the Artesian Hot and Cold Water Company, Limited, a corporation organized and existing under and by virtue of the laws of the State of Idaho, and whose principal place of business is at Boise City, Idaho, the party of the first part for and in consideration of value received to it in hand paid by the Boise Artesian Hot and Cold Water Company, Limited, a corporation organized and existing under and by virtue of the laws of the State of West Virginia, and whose principal place of business is at Boise City, Idaho, the party of the second part, the receipt whereof is hereby acknowledged, does by these presents, grant, bargain, sell, assign, turn over and convey unto the said party of the second part, its successors and assigns, the grant of franchise to lay pipes in the streets and alleys of Boise City, in Ada County,

Idaho, and to furnish the residents of said city with water for a consideration, being by ordinance of said Boise City duly passed and granted to H. B. Eastman and B. M. Eastman, and their successors in interest in their waterworks on October 3d, 1899, together with all rights and privileges belonging thereto, or in any manner connected therewith, or incident or belonging to or with said franchise; also all claims, debts and moneys due, or to become due, to the party of the first part, both those arising ex contractu and those arising ex delicto of every nature, class and kind whatsoever; also the benefits, rights and advantage and right and privilege of being substituted in, to or under all contracts, both executed or executory, made by and between said party of the first part and its customers and patrons in its business of carrying on waterworks hot and cold; also the claims and demands it has against said Boise City of every kind and nature and description; also all the tools, supplies, pipes, furniture, fixtures, material, notes, accounts, bills receivable, choses in action, claims for damages, all and singular, and all the personal property of every nature and kind which it has or owns and which it has used in or pertaining to or with its property, franchise, rights and waterworks which it has owned and operated as the successor of said Eastmans in interest in their waterworks; also all and particularly the claim of party of the first part against Boise City for taking and consuming water of party of first part in the sprinkling of its streets in the years 1900 and 1901; also the claim for balance due on contract for 1899 for water for street sprinkling, the same being \$100.00 and interest on same amounting to \$16.00 to have and to hold, to own

and possess the same to the said party of the second part and its successors and assigns forever.

In witness whereof, the said Artesian Hot and Cold Water Company, Limited, has hereunto set its name and seal by the hand of its president and secretary in accordance with a resolution of its stockholders and of its Board of Directors this 28th day of August, 1901.

ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,

[Seal]

By C. W. MOORE,
President, and
B. S. HOWE,
Secretary.

Plaintiff's Exhibit "D."

To the Honorable Mayor and Common Council of Boise City, Idaho, and to Boise City:

Sirs: You are hereby notified not to take water from the waters or waterworks or water pipes of the undersigned for the purpose of sprinkling upon roads, streets or alleys, and you are to discontinue such acts, and that such acts are and have been regarded as trespasses and as wrongful, unnecessary and in disregard of the rights of this company. You are also notified not to take or use any of the waters of this company for any purpose without first making promise and arrangement to pay for the same a fair remuneration.

And the undersigned forbids the meddling with its waterworks, properties, the taking of its water for street sprinkling purposes under or by virtue of Ordinance No. 304 or at all without promise first made to pay for the same, and you are requested to repeal ordinance demand-

ing free water numbered 304, and you are again informed that the undersigned regards the same as illegal and void, and that the enforcing the same is a trespass on the rights and properties of the undersigned and a great damage to this company.

Boise, Idaho, November 21st, 1901.

Respectfully submitted,

C. W. MOORE,

President.

Attest: B. S. HOWE,

Secretary.

Plaintiff's Exhibit "E."

To the Mayor and Common Council of the City of Boise City, Idaho, and to Boise City:

Gentlemen: The undersigned, the Boise Artesian Hot and Cold Water Company (Limited), a corporation of the State of West Virginia, and the successor in interest in the waterworks and all pertaining thereto (by reason of its successorship to the properties and rights of H. B. Eastman and B. M. Eastman in their waterworks), of the Artesian Hot and Cold Water Company, Limited, a corporation of the State of Idaho, hereby notifies you that it cannot afford to furnish water for the use of its waterworks to the said city or to any person without compensation, that it is willing to furnish water for all purposes at a reasonable compensation, that under city Ordinance No. 304, the city has been by force and by

virtue of its police power and police force taking water from said works against the wishes and protests of the owners of said waterworks.

The undersigned requests the repeal of said ordinance and objects to the city longer enforcing the same, and objects to the city's meddling with its waters or its pipes or any of its properties; the undersigned has assumed and will perform all the duties and obligations of its said predecessors in interest in the said waterworks and in the rights and privileges pertaining thereto, as successor of the said Eastmans.

The undersigned gives notice that the city must immediately cease to and desist from meddling with, using, taking or consuming its waters or its waterworks or properties or any of them for street sprinkling, or for any other purpose, until action is taken looking to payment or the providing for payment for same.

The city is forbidden to use the stand-pipes owned by the undersigned and connected with its waterworks; the city is forbidden to take water out of the waterworks or pipes of the undersigned by means of said stand-pipes, or by any way or manner for street sprinkling.

The undersigned respectfully but firmly requests and orders the city not to trespass upon its property, not to meddle with it, and not to take water from its said waterworks system without compensation or the promise of compensation.

The present conduct of the city is regarded as a tres-

pass continued and enforced by the police of the city and if longer practiced by the city, the undersigned will attempt to find adequate resistance or appropriate remedy.

Dated September 18th, 1901.

Very respectfully,

BOISE ARTESIAN HOT AND COLD WATER
COMPANY, LIMITED.

[Seal]

By C. W. MOORE,
President.
B. S. HOWE,
Secretary.

Plaintiff's Exhibit "F."

NOTICE.

To the General Public and particularly to all who have been our patrons and customers:

Please take notice that the Artesian Hot and Cold Water Company, Limited, a corporation organized and existing under and by virtue of the laws of the State of Idaho, with principal place of business at Boise City, Idaho, has sold, transferred and turned over its water systems, claims, choses in action, bills of accounts and business to the Boise Artesian Hot and Cold Water Company, Limited, a corporation organized and existing under and by virtue of the laws of the State of West Virginia, with its principal place of business at Boise City, Idaho, which corporation of West Virginia will enter upon and conduct the business of a water company as heretofore conducted by said Artesian Hot and Cold Water Company, Limited, a corporation of Idaho. The closing up of the business of said Idaho corporation can

be transacted with B. S. Howe, its secretary, at his office, in Boise City.

ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,

By B. S. HOWE,
Secretary.

Plaintiff's Exhibit "G."

NOTICE.

To the General Public and to all persons in, and in the Vicinity of Boise City, in Ada County, Idaho:

Please take notice that the undersigned, as successor in interest of the waterworks of H. B. Eastman and B. M. Eastman, and so far of the corporations which were their successors in interest in the waterworks formerly owned by them, will continue and carry on the business of a water company for compensation and solicits your friendly patronage; that it will at same rates continue said business of furnishing water to the people of Ada County in and in the vicinity of Boise City, who reside or have places of business upon its pipe lines; that its principal office and place of business is in the Boise City National Bank Building on Idaho street, in Boise City.

BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,

By C. W. MOORE,
President.

And B. S. HOWE,
Secretary.

Defendant's Exhibit No. 1.**ARTICLES OF INCORPORATION**

of the

**ARTESIAN HOT AND COLD WATER COMPANY,
LIMITED.**

Know all men by these presents, that we, the undersigned, have this day voluntarily associated ourselves together for the purpose of forming a corporation under the laws of the State of Idaho.

And we hereby certify:

First. That the name of said corporation is the Artesian Hot and Cold Water Company, Limited.

Second. The purposes for which it is formed are; to acquire, develop and hold springs, wells and streams of both hot and cold water and conduct the waters thereof to Boise City and vicinity in Ada County, State of Idaho, for the use of said city and the inhabitants thereof; to furnish such waters for municipal, fire, sanitary, domestic, heating, mechanical and other useful and beneficial purposes, and to supply the same to the inhabitants of said Boise City and vicinity for said purposes; to furnish steam for heating, motive power and mechanical purposes; to erect, construct, hold, use, manage and maintain sanitariums, hotels, baths, bath-houses, and all other necessary or convenient buildings at or near said Boise City; to develop, erect, construct, operate, hold, use, manage and maintain artesian wells, reservoirs, pipe lines and tramways.

Also to acquire, hold, use, sell and transfer real estate and all such rights of way, franchises, waters, as

tesian wells, reservoirs, pipe lines, water rights, water powers, machinery, appliances and other rights and property as may be necessary, suitable or convenient to successfully conduct the business of the corporation, and to charge, collect and receive tolls, rents and rates for all services performed or benefits rendered.

Third. That the place where the principal business of said corporation is to be transacted, shall be Boise City, in Ada County, State of Idaho.

Fourth. That the term for which said corporation is to exist, is fifty years from and after the date of its incorporation.

Fifth. That the number of its directors shall be eleven (11) and that the names and residences of those who are appointed for the first year are:

Hosea B. Eastman,	Boise City, Idaho.
Christopher W. Moore,	Boise City, Idaho.
Alfred Eoff,	Boise City, Idaho.
Timothy Regan,	Boise City, Idaho.
Peter Sonna,	Boise City, Idaho.
William H. Ridenbaugh,	Boise City, Idaho.
Nathan Falk,	Boise City, Idaho.
William N. Northrop,	Boise City, Idaho.
Thomas David,	Boise City, Idaho.
John Lemp,	Boise City, Idaho.
Joseph R. De Lamar,	Delamar, Idaho.

Sixth. That the amount of the capital stock of this corporation shall be two hundred and fifty thousand dollars, divided into two thousand five hundred shares (2,500) of the par value of one hundred (100) dollars each.

Seventh. That the amount of said capital stock which

has actually been subscribed is one hundred and thirty-seven thousand five hundred dollars, and the following are the names of the persons by whom the same has been subscribed.

Names of Subscribers.	No. of Shares.	Amount.
Hosea B. Eastman.	445	\$45,500.00
Timothy Regan.	70	7,000.00
Christopher W. Moore.	70	7,000.00
Wm. H. Ridenbaugh.	70	7,000.00
George L. Shoup.	50	5,000.00
Richard Z. Johnson	35	3,500.00
George Ainslie	70	7,000.00
Alfred Eoff	10	1,000.00
Peter Sonna	50	5,000.00
Joseph R. De Lamar	100	10,000.00
Nathan Falk	50	5,000.00
Frank R. Coffin	72	7,200.00
L. Weil	10	1,000.00
David Heron	50	5,000.00
Thomas Davis	20	2,000.00
Sigmund Falk	20	2,000.00
A. G. Redway	10	1,000.00
N. S. Hubbell	10	1,000.00
David Falk	15	1,500.00
William N. Northrop	10	1,000.00
Geo. F. Redway	5	500.00
George Collister	10	1,000.00
George D. Ellis	20	2,000.00
J. Brumback	5	500.00
John Krall	10	1,000.00
Charles Himrod	5	500.00

John Brodbeck	5	500.00
John Lemp	10	1,000.00
James McIntyre	5	500.00
Dwight Arnold	25	2,500.00
S. H. Hays	10	1,000.00
Frank A. Nourse	4	400.00
James H. Bush	5	500.00
James B. Milne	1	100.00
N. H. Millard	3	300.00
Robert Wilson	5	500.00
C. Ellsworth	1	100.00
D. F. Baker	1	100.00
S. B. Mann	1	100.00
Chas. A. Clark	1	100.00
Julius Steinmeier	10	1,000.00
F. Dangel	4	400.00
Thos. J. Groome	10	1,000.00
Wm. Stark	5	500.00
John Case	5	500.00
S. Kaiser	2	200.00
T. C. Maupin	2	200.00
G. E. Gregory	2	200.00
Wm. Simpson	5	500.00
J. R. Bennett	1	100.00

In witness whereof, we have hereunto set our hands and seals this 27th day of March, A. D. 1891.

HOSEA B. EASTMAN,	[Seal]
CHRISTOPHER W. MOORE,	[Seal]
ALFRED EOFF	[Seal]
T. REGAN,	[Seal]
PETER SONNA,	[Seal]
WM. H. RIDENBAUGH,	[Seal]
NATHAN FALK,	[Seal]
WM. NORTHROP,	[Seal]
THOS. DAVIS,	[Seal]
JOHN LEMP,	[Seal]
J. R. De LAMAR.	[Seal]

Signed and sealed and delivered in the presence of:

CHAS. A. CLARK.

State of Idaho, }
 County of Ada. } ss.

On this 27th day of March, in the year 1891, before me, Chas, A. Clark, a notary public in and for said county, personally appeared Hosea B. Eastman, Christopher W. Moore, Alfred Eoff, T. Regan, Peter Sonna, Wm. H. Ridenbaugh, Nathan Falk, Wm. Northrop, Thos. Davis, John Lemp, and J. R. DeLamar, known to me to be the persons whose names are subscribed to the annexed instrument, and acknowledged to me that they executed the same.

In witness whereof, I have hereunto set my hand and affixed my notarial seal, the day and year in this certificate first above written.

[Seal]

CHAS. A. CLARK,
 Notary Public.

State of Idaho, }
County of Ada. } ss.

I, James Wickersham, ex-officio recorder in and for Ada County, State of Idaho, do hereby certify that the above and foregoing is a full, true and correct copy of the Articles of Incorporation of the Artesian Hot and Cold Water Company, Limited, numbered 118, as the same appears on the files of this office.

In testimony whereof, I have hereunto set my hand and official seal this 7th day of January, 1902.

[Seal]

J. H. WICKERSHAM,
Ex-Officio Recorder.

SPECIFICATIONS OF ERROR.

Plaintiff specifies the following as errors made by the Court, and will urge the same as grounds why the judgment should be reversed:

I.

The Court erred in sustaining defendant's objection to the question asked the witness B. S. Howe, "Q. Has anything been paid for water for sprinkling purposes by the city that was taken since August 28, 1901?" and erred in not allowing the witness to answer such question.

II.

The Court erred in sustaining defendant's objection to the question asked the witness B. S. Howe, "Q. I will ask you if during the time alleged in the complaint in which it is alleged the defendant took this water, if the cold water system was paying dividends or produc-

ing a profit?" and erred in not allowing the witness to answer this question.

III.

The Court erred in directing the jury to bring in a verdict for defendant, and erred in giving the jury the instruction in the words following: "You will elect one of your number to act as foreman of the jury, and you will find a verdict for the defendant."

THE VERDICT NOT SUSTAINED BY THE EVIDENCE.

Plaintiff also excepts to the verdict of the jury on the ground that it was not sustained by the evidence, and is contrary to the evidence, and specifies the following particulars in which the verdict is not sustained by the evidence, and is against the evidence: First, the evidence showed that the plaintiff was entitled to recover: Second, the evidence showed that the plaintiff was entitled to recover in that it appeared from the evidence and admissions of the answer that the plaintiff was a corporation as alleged in the complaint, and was the successor in interest of the said waterworks of the said Artesian Hot and Cold Water Company, Limited, and that at the time of bringing the action it was the owner of the claim set forth in the complaint; that the evidence showed the taking of the water as alleged, by the city, and the value of the same is admitted by the answer, and that what was taken prior to August 28th, 1901, as stated in the first cause of action, had not been paid for.

That the verdict was not sustained by the evidence also for the reason that the evidence showed the corpor-

ate existence of the plaintiff, the transfer to the plaintiff by the Artesian Hot and Cold Water Company of all its properties, together with the claim and all claims against the city, and shows that plaintiff was entitled to recover for water taken from said system of waterworks outside the limits of said city to the amount of 1,000,000 gallons of the value of \$125.00.

And that the verdict is contrary to the evidence in this, that the evidence shows, together with the admissions of the answer, that the defendant city in the year 1900, took from the said hot waterworks system water of the value of \$1,234.27, and has never paid for the same, refuses to pay for the same, and that the plaintiff was and is the owner of the said claim.

And that the verdict is not sustained by the evidence in that it is shown by the evidence and the admissions of the answer that in the year 1900 the city took from the said cold water system water to the value of \$1,936.98, and has never paid anything therefor, and refuses to pay therefor, and that plaintiff is and was the owner of the claim for the value of the same.

And that the verdict is not sustained by the evidence and is contrary to the evidence in that it appears from the evidence under the pleadings that in the year 1901, prior to August 28th of that year, the said city took water from the said hot waterworks system to the value of \$826.00, and has paid nothing for the same, and refuses to pay for the same, and that the plaintiff at the time of bringing this action was and is now the owner of this claim for the same.

And that the verdict is not sustained by the evidence and is against the evidence also in this, that it appears

from the evidence and the pleadings that in the year 1901, and prior to August 28th of that year, the said defendant city took from the said cold water system water to the value of \$3,312.00 for street sprinkling purposes, and has not paid anything therefor, and that the plaintiff is the owner of the claim for the payment of the same, and was such owner at the time of bringing this action.

And that the verdict is not sustained by the evidence and is contrary to the evidence also in this, that it appears by the evidence and the admissions of the answer that the plaintiff is a corporation as alleged, doing business in Idaho, is successor in interest in the said waterworks of the said Artesian Hot and Cold Water Company, Limited, and its predecessors in interest, and is the owner of all claims against the city once owned, claimed, or held, by the said Artesian Hot and Cold Water Company, Limited, and was such owner, and has been such successor since the 28th day of August, 1901; and that of the waters taken, belonging to the said Artesian Hot and Cold Water Company, Limited, in the years 1900 and 1901 by the said city, and not paid for, and for which the said city refuses to pay anything, and which were used for street sprinkling purposes by the said city, water of the value of \$7,500 was so taken by the city and used for sprinkling its streets in front of the lots and properties of other private parties abutting on streets and portions of streets sprinkled.

And that the verdict is contrary to the evidence and not sustained by the evidence in this also, that the evidence shows that plaintiff is a corporation doing business in Idaho, as alleged in the complaint, and was at the

time of bringing this action the successor of the said Artesian Hot and Cold Water Company, Limited, in interest in the said waterworks, and owned the said claim sued upon, and that in the years 1900 and 1901, and prior to August 28th, 1901, the said city took water from the said waterworks system and used the same in sprinkling the streets in front of the blocks of said city, and in the parts of said city where the inhabitants thereof were supplied with water not by the said Artesian Hot and Cold Water Company, Limited, but by Peter Sonna, and from a different and distinct system of waterworks, and for such purposes and uses the said city took large amounts of water to the great damage of the said Artesian Hot and Cold Water Company.

And that the verdict is not sustained by the evidence and is against the evidence in that from the evidence and the admissions of the answer, it appears that the plaintiff is a corporation, as alleged in the complaint, doing business in Idaho as the successor of the said Artesian Hot and Cold Water Company, and has been such successor and was doing business since the 28th day of August, 1901, and is the owner of the waterworks mentioned and in possession of the same, and carrying on the same since last mentioned date; and that the defendant, between the 28th of August, 1901, and January 1st, 1902, took, without permission, and against the protest and objection of plaintiff, 25,480,000 gallons of water belonging to the plaintiff and used the same in sprinkling it upon the streets of the city, and that the water was of the value of \$3,160.00; and that it used upon its streets and for sprinkling such parts thereof as were in front of lots owned by other and private persons, waters

of the value of \$2,300.00, and that of the waters so taken, waters of the value of \$900.00 were taken and used by the defendant upon its streets for sprinkling the same in blocks of said city, and portions of said city where the said Peter Sonna furnishes the inhabitants thereof from his waterworks system, and where the inhabitants are not furnished with water from plaintiff's waterworks system, and that the said waters were taken by the said city against the objection and protest of the plaintiff, and under a claim made by the said city that the waters were free, and that it did not have to pay for the same.

That the verdict is not sustained by the evidence, and is contrary to the evidence and the admissions of the answer also in this, that it was shown to have been beyond the extent of the means of the plaintiff and of its said immediate predecessor to furnish water for purpose of street sprinkling to the extent taken by defendant.

The above and foregoing bill of exceptions is hereby presented for settlement by counsel of the plaintiff as their bill of exceptions in said cause.

KINGSBURY & KINGSBURY, and
ALFRED A. FRASER,

Counsel for Plaintiff.

Now, that the foregoing matters may be made a part of the record, the undersigned Judge of the District Court of the United States, for the District of Montana, and the Judge who tried said cause, at the request of the plaintiff, doth hereby allow, settle and sign, within the time allowed by law, and the order of the undersigned,

the foregoing bill of exceptions and order the same to be filed.

Dated June 17, 1902,

HIRAM KNOWLES,
District Judge.

[Endorsed]: No. 199. Circuit Court, United States, District of Idaho. Boise Artesian Hot and Cold Water Co., Plaintiff, vs. Boise City, Defendant. Bill of Exceptions. Filed June 12, 1902. A. L. Richardson, Clerk. Refiled June 21, 1902. A. L. Richardson, Clerk.

In the Circuit Court of the United States for the District of Idaho, Central Division.

BOISE ARTESIAN HOT AND COLD
WATER COMPANY, LIMITED,
Plaintiff,
vs.
BOISE CITY,
Defendant.

Petition for Writ of Error.

To the Honorable Judges of the United States Circuit Court of Appeals, Ninth Judicial Circuit:

Comes now the above-named plaintiff, by its attorneys, and complains that in the record and proceedings had in said cause, and in the verdict, and also in the rendition of the judgment in the above-entitled cause in said United States Circuit Court, Ninth Circuit, District of Idaho, Central Division, at March term thereof, A. D. 1902, against said plaintiff, on the 8th day of May, 1902.

manifest error hath happened to the great damage of said plaintiff.

Wherefore, said plaintiff prays for the allowance of a writ of error, and for an order fixing the amount of bond in said cause, and for such other orders and process as may cause the same to be corrected by the said United States Circuit Court of Appeals for the Ninth Judicial Circuit.

Dated this 1 day of July, A. D., 1902.

KINGSBURY & KINGSBURY, and
ALFRED A. FRASER,
Attorneys for Plaintiff.

Order Allowing Writ of Error.

It is ordered that a writ of error be, and hereby is, allowed to have reviewed in the United States Circuit Court of Appeals, for the Ninth Circuit, the judgment heretofore entered herein, and that the amount of bond on said writ of error be, and hereby is, fixed at \$500.00.

Dated this 1st day of July, A. D. 1902.

JAS. H. BEATTY,
Judge.

*In the Circuit Court of the United States for the District of
Idaho, Central Division.*

BOISE ARTESIAN HOT AND COLD WATER COMPANY, LIMITED,	} Plaintiff,
vs.	
BOISE CITY,	} Defendant.

Assignment of Errors.

Comes now the plaintiff and files the following assignment of errors upon which it will rely in its prosecution of the writ of error in the above-entitled cause:

I.

The Court erred in sustaining defendant's objection to the question asked the witness B. S. Howe, "Q. Has anything been paid for water taken for sprinkling purposes by the city that was taken since August 28, 1901?" and erred in not allowing the witness to answer such question.

II.

The Court erred in sustaining defendant's objection to the question asked the witness B. S. Howe, "Q. I will ask you if during the time alleged in the complaint in which it is alleged the defendant took this water, if the cold water system was paying dividends or producing a profit?" and erred in not allowing the witness to answer this question.

III.

The Court erred in directing the jury to bring in a verdict for defendant and erred in giving the jury the instruction in the words following: "You will elect one of your number to act as foreman of the jury, and you will find a verdict for the defendant."

THE VERDICT NOT SUSTAINED BY THE EVIDENCE.

Plaintiff also excepts to the verdict of the jury on the ground that it is not sustained by the evidence, and is contrary to the evidence, and specifies the following particulars in which the verdict is not sustained by the evidence, and is against the evidence: First, the evidence showed that the plaintiff was entitled to recover; Second, the evidence showed that the plaintiff was entitled to recover in that it appeared from the evidence and the admissions of the answer that the plaintiff was a corporation as alleged in the complaint, and was the successor in interest of the said waterworks of the said Artesian Hot and Cold Water Company, Limited, and that at the time of bringing the action it was the owner of the claim set forth in the complaint; that the evidence showed the taking of the water as alleged by the city, and the value of the same is admitted by the answer, and that what was taken prior to August 28th, 1901, as stated in the first cause of action, had not been paid for.

That the verdict was not sustained by the evidence also for the reason that the evidence showed the corporate existence of the plaintiff, the transfer to the plaintiff by the Artesian Hot and Cold Water Company, of all

its properties, together with the claim and all claims against the city, and shows that plaintiff was entitled to recover for water taken from said system of waterworks outside the limits of said city to the amount of 1,000,000 gallons, of the value of \$125.00.

And that the verdict is contrary to the evidence in this that the evidence shows, together with the admissions of the answer, that the defendant city in the year 1900 took from the said hot waterworks system water of the value of \$1,234.27, and has never paid for the same, refuses to pay for the same, and that the plaintiff was and is the owner of the said claim.

And that the verdict is not sustained by the evidence in that it is shown by the evidence and the admissions of the answer that in the year 1900, the city took from the said cold water system water to the value of \$4,936.98, and has never paid anything therefor, and refuses to pay therefor, and that plaintiff is and was the owner of the claim for the value of the same.

And that the verdict is not sustained by the evidence and is contrary to the evidence in that it appears from the evidence under the pleadings that in the year 1901, prior to August 28th of that year the said city took water from the said hot waterworks system to the value of \$826.00 and has paid nothing for the same, and refuses to pay for the same, and that the plaintiff at the time of bringing this action was and is now the owner of this claim for the same.

And that the verdict is not sustained by the evidence and is against the evidence also in this, that it appears from the evidence and the pleadings that in the year 1901, and prior to August 28th, of that year, the said de-

fendant city took from the said cold water system water to the value of \$3,312.00 for street sprinkling purposes and has not paid anything therefor, and that the plaintiff is the owner of the claim for the payment of the same and was such owner at the time of bringing this action.

And that the verdict is not sustained by the evidence and is contrary to the evidence also in this, that it appears by the evidence and the admissions of the answer that the plaintiff is a corporation as alleged, doing business in Idaho, is successor in interest in the said waterworks of the said Artesian Hot and Cold Water Company, Limited, and was such owner and has been such successor since the 28th day of August, 1901; and that of the waters taken, belonging to the said Artesian Hot and Cold Water Company, Limited, in the years 1900 and 1901 by the said city and not paid for, and for which the said city refuses to pay anything, and which were used for street sprinkling purposes by the said city, water of the value of \$7,500.00 was so taken by the city and used for sprinkling its streets in front of the lots and properties of other private parties, abutting on streets and parts of streets sprinkled.

And that the verdict is contrary to the evidence and is not sustained by the evidence in this also, that the evidence shows that plaintiff is a corporation doing business in Idaho, as alleged in the complaint, and was at the time of bringing this action the successor of the said Artesian Hot and Cold Water Company, Limited, in interest in the said waterworks, and owned the said claim sued upon, and that in the years 1900 and 1901, and

prior to August 28th, 1901, the said city took water from the said waterworks system and used the same in sprinkling the streets in front of the blocks of said city in the parts of the said city where the inhabitants thereof were supplied with water not by the said Artesian Hot and Cold Water Company, Limited, but by Peter Sonna and from a different and distinct system of waterworks, and for such purposes and uses the said city took large amounts of water to the great damage of the said Artesian Hot and Cold Water Company.

And that the verdict is not sustained by the evidence and is against the evidence in that from the evidence and the admissions of the answer, it appears that the plaintiff is a corporation, as alleged in the complaint, doing business in Idaho as the successor of the said Artesian Hot and Cold Water Company and has been such successor and was doing business since the 28th day of August, 1901, and is the owner of the waterworks mentioned and in possession of the same and carrying on the same since the last-mentioned date; and that the defendant between the 28th day of August, 1901, and January 1st, 1902, took, without permission and against the protest and objection of plaintiff, 25,480,000 gallons of water belonging to the plaintiff and used the same in sprinkling it upon the streets of the city, and that the water was of the value of \$3,160.00; and that it was used upon its streets and for sprinkling such parts thereof as were in front of lots owned by other and private persons, waters of the value of \$2,300.00, and that of the waters so taken waters of the value of \$900.00 were taken and used by the defendant upon its streets for sprinkling the

same in blocks of said city, and portions of said city where the said Peter Sonna furnishes the inhabitants thereof from his waterworks system, and that the said waters were taken by the said city against the objection and protest of the plaintiff, and under a claim made by the said city that the waters were free and that it did not have to pay for the same.

That the verdict is not sustained by the evidence and is contrary to the evidence and the admissions of the answer also in this, that it was shown to have been beyond the extent of the means of the plaintiff and of its said immediate predecessor to furnish water for purposes of street sprinkling to the extent taken by defendant.

KINGSBURY & KINGSBURY,

ALFRED A. FRASER,

Attorneys for Plaintiff.

[Endorsed]: No. 199. In Circuit Court of United States for District of Idaho, Central Division. Boise Artesian Hot and Cold Water Co., Plaintiff, vs. Boise City, Defendant. Petition for Writ of Error and Assignment of Error. Filed July 1, 1902. A. L. Richardson, Clerk. Kingsbury & Kingsbury and A. A. Fraser, Attorneys for Plaintiff.

*In the Circuit Court of the United States for the District of
Idaho, Central Division.*

BOISE ARTESIAN HOT AND COLD	}	Plaintiff,
WATER COMPANY, LIMITED,		
vs.		
BOISE CITY.	}	Defendant

Bond on Writ of Error.

Know all men by these presents, that we, the Boise Artesian Hot and Cold Water Company, Limited, as principal, and Alfred Eoff and C. W. Moore, as sureties, are held and firmly bound unto the city of Boise City, defendant above named, in the sum of five hundred (\$500.00) dollars, to be paid to the said Boise City, or to its proper officer, attorney or agent, to which payment well and truly to be made, we bind ourselves and each of us, jointly and severally, and our and each of our successors, representatives and assigns, firmly by these presents. Sealed with our seals and dated the 28th day of June, 1902.

Whereas, the above-named plaintiff, the Boise Artesian Hot and Cold Water Company, Limited, has sued out a writ of error to the United States Circuit Court of Appeals, for the Ninth Circuit, to reverse the judgment in the above-entitled cause by the Circuit Court of the

United States for the District of Idaho, Central Division.

Now, therefore, the condition of this obligation is such that if the above-named Boise Artesian Hot and Cold Water Company, Limited, shall prosecute said writ to effect and answer all costs and damages, if it shall fail to make good its plea, then this obligation shall be void; otherwise to remain in full force and virtue.

BOISE ARTESIAN HOT AND COLD WATER
COMPANY, LIMITED,

[Seal]

By C. W. MOORE,

President.

B. S. HOWE,

Secretary.

C. W. MOORE,

A. EOFF,

Sureties.

State of Idaho, }
County of Ada } ss.

Alfred Eoff and C. W. Moore, whose names are subscribed as sureties to the above bond, being severally duly sworn, each for himself, says: That he is a resident and freeholder in said Ada County, Idaho, and worth the sum in the said bond specified as the penalty thereof, over and above all his just debts and liabilities, exclusive of property exempt from execution.

C. W. MOORE,

A. EOFF,

Subscribed and sworn to before me this 28th day of
June, 1902.

[Seal]

W. S. BRUCE,
Notary Public.

[Endorsed]: No. 199. In Circuit Court of United States, District of Idaho, Central Division. Boise Artesian Hot and Cold Water Company, Plaintiff, vs. Boise City, Defendant. Bond on Writ of Error. Filed July 1st, 1902. A. L. Richardson, Clerk.

Bond approved.

BEATTY,
Judge.

Citation.

UNITED STATES OF AMERICA—ss.

The President of the United States, to the City of Boise City, Idaho, and to W. E. Borah, J. J. Blake and Charles S. Kingsley, Its Attorneys, Greeting:

You are hereby cited and admonished to be and appear at the United States Circuit Court of Appeals for the Ninth Circuit, to be held at the city of San Francisco, in the State of California, within thirty days from the date of this writ, pursuant to a writ of error filed in the clerk's office of the Circuit Court of the United States for the District of Idaho, Central Division, wherein the Boise Artesian Hot and Cold Water Company, Limited, is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment in the said writ of error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Honorable MELVILLE W. FULLER, Chief Justice of Supreme Court of the United States of America, this 1st day of July, A. D. 1902, and of the independence of the United States the one hundred and twenty-sixth.

JAS. H. BEATTY,

United States District Judge, Presiding in the Circuit Court for the District of Idaho.

Attest:

[Seal] A. L. RICHARDSON,

Clerk.

Service of the within citation and receipt of a copy thereof is hereby admitted this 1st day of July, 1902.

CHAS. S. KINGSLEY,

J. J. BLAKE, and

W. E. BORAH,

Attorneys for Defendant in Error.

[Endorsed]: No. 199. In Circuit Court of United States, District of Idaho, Central Division. Boise Artesian Hot and Cold Water Company, Limited, Plaintiff, vs. Boise City, Defendant. Citation. Filed July 1, 1902. A. L. Richardson, Clerk.

Writ of Error.

UNITED STATES OF AMERICA—ss.

The President of the United States, to the Honorable, the Judges of the Circuit Court of the United States for the Ninth Circuit, Central Division, of the State of Idaho, Greeting:

Because, in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Circuit Court, before you, or some of you, between Boise Artesian Hot and Cold Water Company, Limited, a corporation, defendant and plaintiff in error, and Boise City, plaintiff and defendant in error, a manifest error hath happened, to the great damage of the said Boise Artesian Hot and Cold Water Company, Limited, a corporation, plaintiff in error, as by its complaint appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ, so that you have the same at the city of San Francisco, in the State of California, on the 31st day of July, next, in the said Circuit Court of Appeals, to be then and there held, that the record and proceedings aforesaid being inspected the said Circuit Court of Appeals may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness, the Honorable MELVILLE W. FULLER,
Chief Justice of the United States, the first day of July,

in the year of our Lord one thousand nine hundred and two.

[Seal]

A. L. RICHARDSON,

Clerk of the Circuit Court of the United States, for the
Ninth Circuit, Central Division, of the State of
Idaho.

Allowed by:

JAS. H. BEATTY,

Judge.

Service of within writ and receipt of a copy thereof is hereby admitted this 1st day of July, 1902.

CHAS. S. KINGSLEY,

J. J. BLAKE, and

W. E. BORAH,

Attorneys for Defendant.

The answer of the Judges of the Circuit Court of the United States of the Ninth Judicial Circuit, in and for the District of Idaho.

The record and all proceedings of the plaint whereof mention is within made, with all things touching the same, we certify under the seal of our said Court, to the United States Court of Appeals for the Ninth Circuit, within mentioned at the day and place within contained, in a certain schedule to this writ annexed as within we are commanded.

By the Court.

[Seal]

A. L. RICHARDSON,

Clerk.

[Endorsed]: No. 199. In Circuit Court of United States, District of Idaho. Boise Artesian Hot and Cold Water Company, Plaintiff, vs. Boise City, Defendant. Writ of Error. Filed July 1, 1902. A. L. Richardson, Clerk.

*In the Circuit Court of the United States, Central Division,
District of Idaho.*

BOISE ARTESIAN HOT AND COLD
WATER COMPANY, LIMITED,

Plaintiff in Error,

vs.

BOISE CITY,

Defendant in Error.

Clerk's Certificate to Transcript.

I, A. L. Richardson, Clerk of the Circuit Court of the United States in and for the District of Idaho, do hereby certify the foregoing transcript of pages, numbered 1 to 118, inclusive, to be a full, true, and correct copy of the record and proceedings in the above-entitled cause, and that the same together constitute the transcript of the record and the return to the annexed writ of error.

I further certify that the cost of said record, amounting to the sum of \$80.70, has been paid by the plaintiff in error.

Witness my hand and the seal of said Circuit Court, affixed at Boise, Idaho, this 10th day of July, A. D. 1902.

[Seal]

A. L. RICHARDSON,

Clerk.

[Endorsed]: No. 864. In the United States Circuit Court of Appeals for the Ninth Circuit. The Boise City Artesian Hot and Cold Water Company, Limited, Plaintiff in Error, vs. Boise City, Idaho, Defendant in Error. Transcript of Record. Upon Writ of Error to the United States Circuit Court for the District of Idaho, Central Division.

Filed July 21, 1902.

F. D. MONCKTON,

Clerk.